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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1137

FOTOMAT CORPORATION,

Petitioner,

vs.

PHOTOVEST CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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No. .....

FOTOMAT CORPORATION,

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vs.

PHOTOVEST CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Fotomat Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A)[1] is reported at 606 F.2d 704 (7th Cir. 1979). The opinion of the District Court (App. B) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 24, 1979 (App. C). A timely petition

[1]Because of the length of the opinions of the Court of Appeals and the District Court, the appendix to this petition has been separately bound.

for rehearing with a suggestion for rehearing *en banc* was denied on October 25, 1979 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision and Rule Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Rule 5(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> **Service: When required.** . . . [E]very pleading subsequent to the original complaint . . . every paper relating to discovery required to be served upon a party . . ., every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

Question Presented

Whether, in a non-jury federal antitrust case, the trial court's acceptance and expressed reliance upon a secret trial brief in excess of two hundred pages, which was not served upon the opposing party until two months after the commencement of trial, was a violation of the opposing party's due process rights under the Fifth Amendment, contrary to Rule 5 of the Federal Rules of Civil Procedure, and presumptively prejudicial.

Statement

Fotomat sells film and film processing through company-owned and franchised "Fotomat kiosks." Photovest operated fifteen such franchised kiosks in Indianapolis, and this case arose out of disagreements ensuing from that relationship. Photovest charged Fotomat with violations of federal and Indiana antitrust law, breach of contract, fraud, "tortious breach of contract," and bad faith defense of the lawsuit.

Three days before trial commenced, Fotomat counsel learned that counsel for Photovest had already given the federal district court a secret 207 page trial brief which Photovest did not intend to serve upon Fotomat (App. A at 3a). This trial brief was intended "to serve as a roadmap . . . of how we are, where we are at each point in the trial . . ." (X Tr. 1690), and was considered by Photovest "important to an understanding of what this case is really all about" (Trial Brief, at i). The brief canvassed every one of Photovest's contentions, described at exhaustive length facts favorable to Photovest's case, and, in the last of three volumes, provided a detailed comment on the credibility of Photovest's and Fotomat's anticipated witnesses, sharply attacking the latter.

Photovest counsel considered the brief so "sensitive" that they "would not have submitted . . . [it] had we thought we were going to submit it to . . . [Fotomat]" (X Tr. 1690). Rather, they "would have written a different, a lesser brief" (XI Tr. 1701).

Fotomat immediately complained to the trial court, only to find that the court intended to "leave counsel where they find themselves" (App. A at 3a). Fotomat then filed a motion to reconsider which was heard

before trial began. Photovest counsel protested that its trial brief contained "sensitive" material (II Tr. 212); that "[w]e prepared the entire document in the expectation it would be for the Court's consumption . . . " (II Tr. 211); and that "[i]n its present form it is not designed for comsumption by the other side's witnesses in anticipation of their testimony" (II Tr. 212).

The trial court agreed that the brief was so sensitive that Photovest never would have submitted it "in the first place if it was an exchange brief" (II Tr. 214). The court further noted that the trial brief was intended to "kerwhoppy" Fotomat (II Tr. 214), but concluded that the court would accept the brief because "I am going to accept all the help I can get that helps me get ready for correct rulings" (II Tr. 215).

The brief had its anticipated effect. During Photovest's opening arguments, for example, the trial court demonstrated that it had accepted the help it expected of the brief by asking several specific questions which had been generated by the trial brief of "which the other side hasn't had the benefit yet . . ." (II Tr. 226; *see generally* II Tr. 226, lines 9-12; II Tr. 227, lines 17-19; II Tr. 228, lines 21-23).

The trial court refused to require service of the brief, but did require Photovest to turn over to Fotomat a shortened version. What was finally served upon Fotomat constituted a drastically abridged version "omitting," in the words of Photovest's counsel, "those parts which in effect indicate how we expected to prove what we expect to prove" (X Tr. 1685). This resulted in the extirpation of key factual citations, comment on credibility, and a host of key points sought to be established by plaintiffs; in addition, the third volume, consisting of Photovest's analysis of anticipated witnesses, was completely withheld.

The trial court ordered this censured version turned over in three days (II Tr. 217; XI Tr. 1719). Photovest failed to do so until ten days later, after half its case had already been completed (App. A at 3a-4a; X Tr. 1687-88). The trial was then recessed for some two months, for unrelated reasons.

When trial resumed, Fotomat again urged that the in camera filing had been improper and asked for a new trial and recusal of the trial judge. This motion was also rejected, although Photovest at this time finally turned over an unabridged copy of its trial brief, with only eight days of its case in chief remaining (XI Tr. 1726). What was discovered in the original version was not just a highly argumentative exposition of law but a virulent and personal attack upon Fotomat's witnesses as well as its trial counsel (*see* pp. 11-12, *infra*).

Subsequent to trial, the trial court sitting without a jury found for Photovest on virtually every one of its counts in an opinion which contained no citation to legal authority and which copied the bulk of Photovest's proposed findings (App. B).[2] Judgment was entered in the amount of $2,923,557.

On appeal, the Seventh Circuit reversed the trial court in five major substantive areas, but affirmed the bulk of the judgment below. It also held, pursuant

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[2]The Seventh Circuit noted that the trial court "did adopt with little change the bulk of Photovest's findings . . ." (App. A at 58a).

to its rule making powers, that in camera filings of trial briefs would be prospectively barred within district courts in the Seventh Circuit (App. A at 10a). However, it declined to apply this ruling to Fotomat, rejecting Fotomat's claim of due process violation and its interpretation of Federal Rule of Civil Procedure 5(a) (App. A at 3a-11a).

The Court of Appeals acknowledged that the failure to serve trial briefs creates "the increased potential for prejudice . . ." (App. A at 9a).

> The district court judge, particularly in the case of a long and complex trial, who has entertained incorrect concepts about some aspects of the case during the course of the trial because of an ex parte brief, is placed in the difficult position of returning to a status quo ante position prior to engaging in the decisional process (*id.*).

Notwithstanding these observations, the Court declined to order a new trial and concluded instead that the trial brief "had not been demonstrated to have prejudiced the defendant" (App. A at 10a).

REASONS FOR GRANTING THE WRIT

This case presents an important question pertinent to federal trials concerning the propriety and effect of ex parte communications between an interested party and the trier of fact. Courts for many decades have condemned ex parte communications with a judge as violations of fundamental due process. In addition, the broad sweep of Federal Rule of Civil Procedure 5(a) appears to embody that fundamental principle and mandates that papers filed with a court also be served upon opposing counsel. In keeping with due process guarantees, the rule could hardly permit less.[3]

Rule 5(a) provides that specifically enumerated types of filings and every "similar paper" shall be served upon opposing counsel. The Court of Appeals acknowledged that this wording "suggests an expansive application of the rule" (App. A at 6a).[4] It concluded, however, that the "glaring absence from the list" of trial briefs, which it called items of "prominence and significance," shows that the framers of the rule did not intend for them to be served (*Id.*). That conclusion is a non sequitur.

Trial briefs are indeed prominent and significant items. No document is more calculated to influence than a trial brief, especially where the trial judge is the sole fact finder. Trial briefs are crucial in provid-

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[3]Rule 5, however, has never been examined or interpreted by this Court. Even the Court of Appeals acknowledged that no cases have addressed the application of Rule 5 to trial briefs (App. A at 6a).

[4]"The words 'similar paper' evidence an attempt by the draftsmen to avoid a restrictive interpretation of the rule's specific list of papers, which is not intended to be exhaustive." 4 Wright & Miller, *Federal Practice and Procedure: Civil* § 1143 at 577 (1969).

ing an "opportunity to communicate and *persuade* in advance of trial. . . . Of course, the *adversary must be served.* . . ." (emphasis added). Marshall, *Persuading Judges in Bench Trials,* LITIGATION 11, 12 (Summer, 1977).

It is inconceivable that any advisory committee could intend that such paper be subject to secret in camera filings. Could post-trial briefs, which are also not specifically mentioned by Rule 5(a), be filed for the trial court's edification but not served on counsel?

The mandate of the due process clause, as well as its application through the dictate of Rule 5(a), seems clear. But despite such clarity, trial briefs have been inconsistently treated in the federal district courts. While the Seventh Circuit has now imposed its own rule prospectively to the same effect as Rule 5(a), and some district courts specifically require in their rules that trial briefs be exchanged,[5] a number of other courts in other circuits expressly have excepted such important filings from the service requirement.[6] Still other courts may also sanction this practice by custom—the trial court here specifically noted that its approval of in

[5]*See e.g.,* Rule 5(a) of the United States District Court for the District of Maine.

[6]*See e.g.,* Rule 20(c) of the United States District Court for the District of Kansas; Rules XV and XVI of the United States District Court for the Eastern District of Michigan; Rule 5 of the United States District Court for the Southern District of Mississippi; Rule 13 of the United States District Court for the Western District of Arkansas; and Order Re: Civil Cases Set For Trial In Special Or Regular Terms Of Court In The District of South Carolina (issued July 7, 1964).

Rule 83 of the Federal Rules of Civil Procedure, by contrast, admonishes that district courts may only promulgate local rules which are "not inconsistent" with the Federal Rules. And, of course, the Federal Rules cannot be inconsistent with the Constitution.

camera filings was based only on its own unwritten practice (X Tr. 1696).[7]

The instant case clearly reflects how ill-advised is the policy of permitting any in camera filings. Had due process guarantees and Rule 5(a) been followed, no potential for infected decision-making could have arisen.

A fair trial in a fair tribunal is a basic requirement of due process. It cannot be enjoyed in the absence of an effective opportunity to be heard. A fundamental minimum must be a litigant's right to know of and respond to an adversary's argument before the trier of fact has undertaken to study and rely upon the opponent's advocacy.[8] This Court has affirmed that no meaningful opportunity to be heard can exist when a fact finder is long exposed to unilateral advocacy. *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965).[9]

[7]Response to informal inquiries recently sent to attorneys around the country reveals that in several other districts the ex parte filing of trial briefs, at least prior to the conclusion of trial, is countenanced.

[8]"[P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). *See also Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970); *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976).

[9]In *Armstrong,* the Court held that a failure to notify a litigant of the pendency of proceedings, after which an order was entered against him, was not cured by subsequently permitting the litigant to present evidence in support of his position.

Disapproval of ex parte dealings with the trier of fact has also been voiced in a variety of other contexts. *See United States v. United States Gypsum Co.,* 438 U.S. 422, 460-62 (1978) (ex parte communications by judge with a deliberating jury); *Camero v. United States,* 375 F.2d 777, 780-81 (Ct.Clms. 1967) (ex parte communication between agency attorney and military judge); *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 56 (D.C. Cir. 1977) (ex parte communications in

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The decision of the Court of Appeals reflects a significant departure from these very fundamental and basic tenets. It was indisputable that the trial court had viewed Photovest's case through a one-sided "road-map" so adversarial in nature that it was not designed for the opponent's consumption, and would not have been filed had exchange been anticipated. It was also true that the trial court was able to dwell upon these ex parte and therefore unanswerable arguments for almost two months. Yet the Court of Appeals still declined to order a new trial because the trial brief "had not been demonstrated to have prejudiced defendant" (App. A at 10a).

Such a decision ignores the reality of the decision-making process. How could Fotomat "show" prejudice short of psychoanalyzing the trial judge? A fundamental right—that of an unbiased and fair tribunal—was in fact conditioned upon proof impossible to obtain. How do judges think, and how did this particular trial judge think? As this Court has said, "nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Berger v. United States,* 255 U.S. 22, 36 (1921).

Certain acts should always be considered presumptively prejudicial, particularly when the challenged procedure is so fraught with danger. Indeed, this and other courts have repeatedly stressed not only the importance of fairness in federal trials, but also the necessity for the appearance of fairness.[10]

agency rule making proceedings between participants and agency commissioners); *Haller v. Robbins,* 409 F.2d 857, 859 (1st Cir. 1969) (ex parte communication between prosecutor and judge prior to sentencing); *United States v. Huff,* 512 F.2d 66, 71 (5th Cir. 1975) (ex parte communication between prosecutor and judge prior to sentencing); *Burton v. G.A.C. Finance Co.,* 525 F.2d 961, 963-64 (5th Cir. 1976) (lodging of evidence with court without serving copy on opposing counsel).

In cases like the instant one, client-litigants can hardly be expected to have appropriate confidence in a judicial system in which their opponents are permitted to deluge the triers of fact with secret arguments and biased characterizations of fact—in effect to be granted a special audience with the triers of fact. It is just such submissions that cause the skepticism and disgruntlement that so many judges and lawyers have attempted to erradicate by preaching, and observing, the necessity of even the appearance of fairness.

Impartiality is obviously crucial to the decision-making process. Yet here the personal process of subjectively selecting among conflicting inferences and competing claims to credibility was endangered by the trial court's two month exposure to the Photovest trial brief. Just how does a litigant later undo the embedding in the fact finder's mind of such assertions as the one that "[Photovest's president] and the others were understandably under stress during 1970 as they struggled to patch together a sinking business" (Trial Brief,

[10] *E.g., Communist Party v. Subversive Activities Control Bd.,* 351 U.S. 115, 124 (1956); *Offutt v. United States,* 348 U.S. 11, 14 (1954); *In re Murchison,* 349 U.S. 133, 136 (1955); *Public Utilities Comm'n v. Pollak,* 343 U.S. 451, 466-67 (1952) (statement of Frankfurter, J.); *Regents of University of California v. Bakke,* 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.); *Proctor v. Warden, Maryland Penitentiary,* 435 U.S. 559, 560 (1978).

Even in an administrative proceeding, a case has been reversed where there has been an improper intrusion into the mental processes of the fact finder, the court stressing the appearance as well as the fact of a lack of impartiality. *The Pillsbury Co. v. FTC,* 354 F.2d 952, 963-64 (5th Cir. 1966). *See also Koniag, Inc. v. Andrus,* 580 F.2d 601, 610-11 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1052 (1979).

at 171-72), or to unring a bell which pealed that "the point of all this is that Fotomat has shown a willingness to adopt any position it thinks will intimidate, dupe, weaken or cajole the other side, quite without regard to what its admitted legal or moral obligations are" (Trial Brief, at 176).[11]

The Court of Appeals' conclusion that there was evidence to support those portions of the trial court's findings that were affirmed misses the point.[12] There was also evidence supporting Fotomat's view, but this conflicting evidence was examined by a trier of fact who candidly admitted that he intended to obtain all

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[11]That Fotomat was eventually given a belated view of Photovest's secret urgings can hardly be said to have removed the taint from the trial proceedings. The trier of fact had dwelled on Photovest's advocacy for too long to assure that its influence could be effectively counterbalanced. How can one say that there was no prejudice in view of the trial court's subsequent embracing of a "malicious defense" concept which the appellate court found to be completely specious (App. A at 52a-53a)?

For that matter, how does the lawyer for a litigant successfully dispel the effects of this secret invective when, for two months, the trier of fact has been mulling over secret charges that the opposing lawyer's behavior is "indefensible" (Trial Brief, at 98), that Fotomat's counsel is guilty of fabrications and inventions (*id.*), and that his law firm has been guilty of threatening abuse of other litigants and has "dreamed up" disingenuous "justification" for his client's activities (Trial Brief, at 99). Is it really so easy to dispel, retroactively, excoriations of "Fotomat's attitude toward litigation" as an illicit tool of competition (Trial Brief, at 74-75)?

[12]The Court of Appeals' holding that the trial brief did not influence and could not have prejudiced Fotomat is also inconsistent with its determination that at least five of the legal conclusions made by the district court were plainly incorrect and unsupported (App. A at 37a, 38a-42a, 48a-49a, 52a-53a, 55a).

the help he could from the ex parte submission (II Tr. 214).[13]

Moreover, the subjective aspects of the trial court's decision-making were effectively shielded from appellate review. Such review "is circumscribed by the deference . . . [the appellate court] must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).[14]

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[13]For instance, the district court concluded (and the Court of Appeals agreed that there was evidence to support the finding) that drive-thru film development stores do not compete with other retailers of film development such as drug stores, even though the product sold was identical (App. A at 17a). This finding was essential to Photovest's attempted monopolization claim which by itself constituted $2.8 million of the award. Viewed without all the trappings, isn't a film store a film store, whether you drive through or walk? Even Photovest's own president agreed (DX 4200 at 427-28).

[14]This strict view has been consistently applied by this Court and the various Circuits. It has been affirmed that "a choice between two permissible views of the weight of evidence is not 'clearly erroneous,'" *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); that "[c]hoices of credibility are within the discretion and prerogative of the trial court . . .," *Blunt v. Marion County School Board*, 515 F.2d 951, 958 (5th Cir. 1975); that the trier of fact "has the *exclusive* function of . . . drawing inferences from facts established, [and] resolving conflicts in the evidence, . . ." *Rasmussen Drilling v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978) (emphasis added); that the Courts of Appeals are not empowered to weigh the evidence, *Bellevue Gardens, Inc. v. Hill*, 297 F.2d 185, 186 (D.C. Cir. 1961); that a reviewing court's role is limited even with respect to inferences drawn from undisputed evidence, *Valley Cement Industries, Inc. v. Midco Equipment Co.*, 570 F.2d 1241, 1243 (5th Cir. 1978); and that reversal is not in order even if the Court of Appeals would have

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The conclusion is clear: a party confronted with an ex parte submission to the fact finder in a federal court should not have to search either the submission or the fact finder's conclusions for some sign of influence or prejudice. Some acts speak for themselves. Thus, it is clear beyond doubt that if what Photovest wrote to, and was read by, the trial judge had in fact been spoken to him, this case would have been reversed outright.[15] Why is the result different because the words were written? One could argue, in fact, that words in cold print carry a dignity, authority, and persuasiveness that far outweigh the same words spoken in the informal, often bantering, exchange that sometimes occurs between counsel and judge. Yet even such verbal exchanges are disallowed.[16]

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viewed the facts differently, *United Barge Co. v. Notre Dame Fleeting & Towing Service, Inc.*, 568 F.2d 599, 604 (8th Cir. 1978).

The Seventh Circuit has also heeded this rule. *See Pollice v. Hartford Fire Ins. Co.*, 355 F.2d 524, 525-26 (7th Cir. 1965). Indeed, that court views its duty as being only "to determine whether the evidence most favorable to the appellee will sustain a jury verdict." *Mann v. Anderson*, 447 F.2d 533, 536 (7th Cir. 1971).

[15]*E.g., Morgan v. United States*, 304 U.S. 1, 19-21 (1938); *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 51-59; *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 540-41 (3d Cir. 1948); *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 65-67 (D.C. Cir. 1958); *Haller v. Robbins, supra*, 409 F.2d at 859.

[16]In *United States v. Quattrone*, 149 F.Supp. 240 (D.D.C. 1957), Judge Youngdahl, while having a motion under advisement, was visited in his chambers by counsel not of record and asked about the expected date of the judge's ruling and of the trial. Although the attorney stated emphatically that he had neither the intention nor the desire to attempt to influence the court, Judge Youngdahl disqualified himself. "In making this decision," he said, "the Court believes that it should consider not only whether what has happened would actually influence the Court, but whether it might give the appearance of so doing." *Id.* at 241.

Triers of fact, as well as litigants, are entitled to an authoritative ruling from this Court in regard to this extraordinarily important and common practice of submitting trial briefs and on the issue of whether such briefs may continue in many courts to be filed in secret or whether all parties are required by Rule 5(a) and by the fact as well as the appearance of fairness to serve such briefs simultaneously upon all opposing parties.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 77-1741, 77-1742

PHOTOVEST CORPORATION, an Indiana Corporation,
Plaintiff-Appellee and Cross-Appellant,

vs.

FOTOMAT CORPORATION, a Delaware Corporation,
Defendant-Appellant and Cross-Appellee.

Appeal From the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 74-705-C—**Cale J. Holder,** *Judge*

ARGUED JANUARY 22, 1979
DECIDED SEPTEMBER 24, 1979

Before Pell, *Circuit Judge,* Markey, *Chief Judge,** and Wood, *Circuit Judge.*

Pell, *Circuit Judge.* The defendant, Fotomat Corporation, is engaged in the retail sale of film processing, film, and camera related products which are sold insofar as the present litigation is concerned from small (9′ x 5′), "drive-thru" kiosks located generally in shopping center parking lots. It obtained the rights to this retailing concept in 1967 and opened its first stores in April of that year. It also began selling franchises, and by 1971, 1,035 units were open, 680 company stores and 355 franchised stores. These stores sell mostly to amateur photographers. The customer drives up to the side of the kiosk and gives his exposed

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*Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals is sitting by designation.

film to a "Fotomate" who operates the kiosk. He may also purchase film or other items from the Fotomate. One or two days later the customer returns and receives the processed work. In each metropolitan area in which it operates, Fotomat runs a pickup and delivery service to the kiosks from a central area office which is staffed by an area manager and some assistants. A route driver runs a daily pickup and delivery circuit of all the kiosks in the area, delivering the previous day's developed film and picking up that day's film. At the end of the route, the driver delivers the film to the processor.

The plaintiff, Photovest Corporation, was formed in 1968 by three individuals desiring to invest in Fotomat franchises. Photovest was incorporated for the purpose of operating a block of Fotomat kiosks in the Indianapolis area. On August 26, 1968, Photovest signed a master franchise purchase agreement obligating it to purchase 15 franchises to operate 15 Fotomat stores in Marion County, Indiana. Specific store sites had not been selected, but each store was bound by the standard Fotomat franchise agreement and the standard Fotomat lease agreement, which would be separately signed upon the opening of each store. Photovest agreed to pay $21,000 for each franchise for a total of $315,000. It also agreed to pay Fotomat royalties and advertising fees based on monthly gross sales. Additional details of the franchise agreement as well as other pertinent facts will be set forth throughout this opinion where relevant to the specific argument being discussed.

In December 1974, Photovest filed this action[1] charging Fotomat, *inter alia,* with violations of both

[1]Photovest amended its complaint on several occasions throughout the litigation. Our discussion proceeds on the basis of the final amended complaint.

federal and state antitrust laws, breach of contract, fraud, and tortious breach of contract. After trial in the district court, the judge made extensive findings of fact and conclusions of law and awarded Photovest damages totaling $3,017,161.86. Prior to the district court's decision, Fotomat had paid Photovest $41,-484.53 which reduced the final judgment to $2,923,557.

In this appeal, Fotomat raises numerous arguments regarding the antitrust, breach of contract, and damages aspects of the district court's decision. It also argues that some of the procedures followed by the district court judge violated Fotomat's due process rights. We will address one of these procedural problems first.

I. EXCHANGE OF BRIEFS PROCEDURE

Fotomat argues that it was prejudiced, and indeed was deprived of due process, by the fact that Photovest submitted an extensive trial brief to the district court judge without at the same time providing Fotomat with a copy. On Friday, December 3, 1976, Fotomat's counsel first discovered that Photovest had earlier filed a 207 page trial brief with the district court judge and that Photovest did not intend to serve a copy on Fotomat. Earlier that day Fotomat had given Photovest a copy of its trial brief. Since the trial was to begin on Monday, December 6, 1976, Fotomat immediately complained to the judge of the *in camera* filing. The judge found that the pretrial order did not require pretrial exchange of briefs and that there was no record of any agreement to such an exchange. He said he "would leave counsel where they find themselves." At that time, Photovest agreed to return Fotomat's trial brief which Fotomat had earlier served on it. On Monday, December 6, the first day of trial,

Fotomat filed a motion to reconsider and the judge granted a hearing. After hearing arguments on the exchange of briefs issue, he ordered Photovest to serve its brief on Fotomat with some modifications. Photovest was allowed to edit and delete certain portions of its brief "to avoid tipping off Fotomat's witnesses." It served the edited brief on Fotomat on December 16, 1976, the ninth day of the trial. Trial was then recessed for two months. The judge advised Fotomat that it could submit a revised trial brief prior to resuming trial and could follow the same procedure as Photovest in submitting its trial brief. That is, Fotomat could submit a complete version to the court and a modified version to Photovest. All briefs were to be exchanged at the conclusion of the trial. In January 1977, Fotomat served Photovest with its 38-page trial brief filed with the court on December 3, 1976, and on February 11, 1977, Fotomat filed a 290-page supplemental trial brief and served a copy on Photovest. After the recess, trial resumed on February 14 at which time Fotomat again objected to not being served a copy of Photovest's unedited trial brief. Photovest then voluntarily agreed to give Fotomat a copy of the unedited version which it did later that day.

Fotomat contends that it was prejudiced by this procedure and that the procedure violates the Federal Rules of Civil Procedure and the Constitution. Before addressing the propriety of the delayed exchange of trial briefs, we note that there is in this case the additional factor that Fotomat was apparently unaware of the procedure until the first day of trial by which time Photovest had already submitted its unedited brief to the court. The record indicates that this was a result of a bona fide misunderstanding between counsel

at the pretrial stages. Noting in the record suggests any foul play or attempts to secure an unfair advantage by either party. Accordingly, the only issues are whether the procedure violates either the Federal Rules of Civil Procedure or the Constitution, or is otherwise undesirable, and if so, whether Fotomat was prejudiced by it. We also note that the delayed exchange of trial briefs is not an unusual procedure in the Southern District of Indiana. Local Rule 19(k) of the District Court for the Southern District of Indiana[2] does not appear to require pretrial exchange of trial briefs and the practice in that district is not to exchange until the conclusion of trial.

Fotomat contends that the procedure violates Rule 5(a), Fed.R.Civ.P., which requires service on all the parties of

> every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to dis-

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[2]The rule provides:

> (k) Subsequent to Pretrial Conferences. At such time as directed by the court, each party shall submit the following to the trial judge, unless notified to the contrary:
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> (1) A trial brief, the nature and extent of which will be directed by the judge. Copies of all foreign statutes involved, with reference, to their source, shall also be submitted.
>
> (2) In non-jury cases, proposed findings of fact and conclusions of law, including citations for each conclusion of law if available.
>
> (3) In jury cases, requested charges to the jury covering issues to be litigated shall be filed in duplicate with the clerk. Each charge shall cite appropriate authority.
>
> A copy of requested charges also shall be served on opposing counsel.

> covery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, *and similar paper*. . . .

(Emphasis added.) Fotomat argues that a trial brief is a "similar paper" under Rule 5(a) and thus that the procedure employed in this case is inconsistent with Rule 5(a).[3] However, neither Fotomat nor Photovest has provided any federal case involving the application of the rule to trial briefs, and our independent research has been equally unsuccessful. Indeed, "the language of Rule 5 has given rise to little controversy." 4 Wright & Miller, Federal Practice and Procedure: Civil § 1141 at 570 (1969). As a result, we are left to write on a clean slate.

The inclusion of the words "and similar paper" in Rule 5(a) indicates that the drafters did not intend the preceding list of documents to be exhaustive. Wright and Miller state that the words suggest an expansive application of the rule. *Id.*, § 1143 at 577. Even an expansive application of the rule does not, in our opinion, clearly mandate pretrial exchange of trial briefs. Rule 5(a) provides an extensive list of documents before concluding with the phrase "and similar paper." Given the prominence and significance of the trial brief in the litigation process, its glaring absence from the list of documents specifically mentioned in the rule supports the inference that the drafters did not intend Rule 5(a) to apply to trial briefs. This

[3]Rule 83, Fed. R. Civ. P., grants district courts the authority to adopt local rules to regulate their practice "in any manner not inconsistent with these rules."

inference is buttressed by the existence of local rules like the one before us, none of which, as far as we have been able to determine, have been successfully challenged as inconsistent with Rule 5(a).[4]

We also note that the rule does not address the timing of the service. The procedure in the present case clearly provided for service on all parties since it always contemplated exchange at the close of trial. The only unusual aspect was that service on the court occurred well before service on the opposing party. Therefore, arguably the rule does not have any application to the issue before us.

Fotomat also argues that the delayed exchange procedure violates the Due Process Clause of the Fifth Amendment. Again we note the absence of any cases involving a due process challenge to a delayed exchange of trial briefs procedure. None of the cases cited by Fotomat involves a closely analogous situation, and instead, Fotomat relies on broad language from due process decisions all of which are clearly distinguishable. For example, Fotomat cites *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969), for the proposition that a party's constitutional rights are infringed if counsel for the opposing party is allowed "to convey in-

[4]*See, e.g.*, Rule 20(c) of the District of Kansas which provides:

> Any party in an action or proceeding before this court may submit a trial brief to the judge in advance of trial, provided prior notice of intention to submit such trial brief is given to all opposing counsel of record at least three days prior to such submission. . . . Two copies of such trial brief shall be delivered to the judge, but such trial brief need not be served upon opposing counsel. After the trial, all briefs shall be filed with the clerk.

See also E.D. Mich. Rule XV and XVI; S.D. Miss. Rule 5; E.D. and W.D. Ark. Rule 13.

formation or to discuss any matter relating to the merits of the case" with the trial judge in the absence of opposing counsel. *Haller* was a habeas corpus case in which the petitioner raised a due process challenge to ex parte communications by the county attorney. The petitioner entered a guilty plea to a kidnapping charge in the state court; but sometime between his arraignment and his sentencing, the county attorney, in the absence of petitioner and his attorney, informed the presiding judge of a statement made by the petitioner's victim of an episode of sordid behavior by petitioner while the victim was in his custody. The judge sentenced petitioner without the petitioner knowing of the ex parte communication. The court of appeals held this to be a violation of due process. The present case differs in many respects, but a critical distinction is that the trial briefs were to be exchanged after trial giving both parties an opportunity to respond to any inaccuracies or misleading information before the court rendered judgment. This fact also distinguishes and renders unpersuasive Fotomat's reliance on *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 56 (D.C. Cir. 1977); and *United States v. Miller*, 495 F.2d 362, 364-65 (7th Cir. 1974).

Fotomat contends that exchange after trial is too late and that this timing transgressed the due process requirement that notice and opportunity to be heard "be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). However, we are of the opinion that exchange of trial briefs at the conclusion of trial is a sufficiently meaningful time for purposes of due process analysis.

None of Fotomat's authority on this issue suggests otherwise. *See, e.g., Edelberg v. Illinois Racing Board*, 540 F.2d 279, 285 n.9 (7th Cir. 1976), and cases cited therein.

That the delayed exchange of trial briefs procedure is not inconsistent with Rule 5(a), Fed. R. Civ. P., and is not per se violative of due process protections does not mean that we approve of it without reservation. Indeed, we are of the opinion that exchange of trial briefs at the time they are filed with the court is sounder procedure, being one more consistent with the elimination of gamesmanship aspects of litigation and, indeed, with the quest for truth, presumably the ultimate aim of adversarial litigation. Any benefits that a delayed exchange may provide are outweighed by the increased potential for prejudice and by the added difficulties resulting from postponing until after trial the curing of any real prejudice caused by the trial briefs. The district court judge, particularly in the case of a long and complex trial, who has entertained incorrect concepts about some aspects of the case during the course of the trial because of an ex parte brief, is placed in the difficult position of returning to a status quo ante position prior to engaging in the decisional process.

The district court judge in the present case explained his reasons for the procedure on the first day of trial:

> I have to go back and give you the basis for my position in the District for not exchanging briefs. 99 percent of our cases are not cases of this nature, that are well prepared by both sides, and I grew up in that period when we had a lot of counter-punchers practicing law, and they were educated by the opposing party and

> did little or no work, but they were very adept at using the work of counsel on the other side. That was basically the background of the rule that I have followed on exchange of briefs.

Although we are somewhat sympathetic to the problem for which the delayed exchange procedure was designed, that problem can be mitigated to some degree by merely requiring the parties to submit their briefs for exchange simultaneously. Moreover, we are more concerned with assuring that a party at all times is as well advised of his opponent's arguments as is the trial judge than we are with the problems of the "counterpuncher."

For these reasons under our supervisory power we hereby direct any district court of this circuit which now follows the practice of delayed exchange of trial briefs to require in all future cases each party to serve his trial brief on all other parties at some reasonably short time before or after he files the brief with the court or provides a copy to the judge.[5]

We find no reason to reverse the district court in the present case on this issue because although we deem more desirable the procedure just announced, the district court's procedure in this case had not been demonstrated to have prejudiced the defendant.

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[5]Our authority to direct procedures in the district court derives from our supervisory powers over the district court. In *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957), the United States Supreme Court stated that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." This pronouncement has been reaffirmed by every court of appeals that has confronted the issue including our own. *See Burton v. United States*, 483 F.2d 1182, 1187-88 (9th Cir. 1973), and cases cited therein. *See also United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976).

The delayed exchange procedure was abandoned early in the trial. Photovest gave Fotomat an edited version of its trial brief on the ninth day of trial, and after a two month recess in the trial, gave it the full, unedited version on the tenth day of trial. As to the first nine days of trial, Fotomat was given the right to call any Photovest witness who had testified during that portion of the trial.[6] During the remaining 21 days of trial, Fotomat did not cite any prejudice from the delay in service. Indeed, in all of its briefs and arguments in this appeal, Fotomat has failed to demonstrate any specific instance of prejudice resulting from the trial brief procedure.

II. ATTEMPT TO MONOPOLIZE

The district court held that Fotomat violated § 2 of the Sherman Act, 15 U.S.C. § 2, and the Indiana statutory counterpart, Ind. Code 24-1-2-2.[7] Section 2 of the Sherman Act prohibits attempts to monopolize. Generally, a plaintiff claiming that the defendant violated this section must prove specific intent and conduct manifesting that intent to monopolize and a dangerous probability of success in a relevant market.[8] *See generally* L. Sullivan, Handbook of the Law of Antitrust §§ 50-52 (1977) (hereinafter *Sullivan*), and cases

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[6]At oral argument in this court, Fotomat argued that some of Photovest's witnesses during the first nine days of trial were adverse witnesses. Photovest disputed this assertion contending that it called adverse witnesses later in its case. Regardless of the accuracy of Fotomat's assertion, it failed to indicate anything in Photovest's trial brief that would have caused prejudice.

[7]*See notes* 27 & 31 *infra*.

[8]A private plaintiff can sue for damages under § 2 if he has been "injured in his business or property." 15 U.S.C. § 15. He can sue for injunctive relief against threatened loss or damage from a § 2 violation. 15 U.S.C. § 26.

cited therein. Before discussing the specific intent and dangerous probability of success elements, we will first address the relevant market issue, one which the parties have vigorously contested.

A. *Relevant Market*

A definition of the relevant market is essential because "without a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equipment, Inc. v. Ford Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). There is some authority for the proposition that in an attempt to monopolize case, as distinguished from a monopolization case, a definition of the relevant market is not necessary. In *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir. 1964), *cert. denied*, 377 U.S. 993, the court stated that "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'"[9] The great weight of authority, however, requires a definition of the relevant market. *See, e.g., United States v. Empire Gas Corp.*, 537 F.2d 296, 298-99 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122; *Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 919 (8th Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525

[9]This follows from the court's rejection of the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. The court rejected this premise on the theory that "specific intent itself is the only evidence of dangerous probability the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." 327 F.2d at 474. *See Knutson v. Daily Review, Inc.*, 548 F.2d 795, 813-14 (9th Cir. 1976), *cert. denied*, 433 U.S. 910. *See also* Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305 (1956).

F.2d 1338, 1348 (3d Cir. 1975); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004; *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149, 161-64 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373, 385 & n.37 (1974). Indeed, one commentator has concluded that the *Lessig* approach "reeks of overkill." Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L.J. 165, 171 (1967). We are similarly unpersuaded by *Lessig* and thus shall proceed to analyze the relevant market in the present case.

The district court concluded that Fotomat attempted to monopolize "the drive-thru retail photo processing submarket in the Indianapolis metropolitan area." Fotomat argues that the district court erred in defining the submarket and that a proper definition of the relevant submarket is much broader and would include photo processing services offered in drugstores, supermarkets, etc.[10] Under its broader market definition, it argues that its share of the market was insufficient as a matter of law to give rise to any probability that it could succeed in monopolizing that market.

The relevant factors for defining the market in a § 2 Sherman Act case are similar to those used to define the market in a § 7 Clayton Act case. In *United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966), the Court stated that "in § 2 cases under

[10]We note here that although delineating the scope of the relevant market entails analysis of both geographic market and product market, our analysis will address only the latter because the parties do not dispute the geographic delineation used by the district court.

the Sherman Act, as in § 7 cases under the Clayton Act (*Brown Shoe Co. v. United States*, 370 U.S. 294, 325) there may be submarkets that are separate economic entities," and that "we see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F. 2d 1264, 1270-71 (9th Cir. 1975); *L.G. Balfour Co. v. F.T.C.*, 442 F.2d 1, 11 (7th Cir. 1971). Accordingly, the *Brown Shoe* opinion is instructive even though it is a Clayton Act § 7 case involving a product market rather than a service market.[11] The Court stated:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325 (footnotes omitted).

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[11]For purposes of market definition, we shall use product market and service market interchangeably unless indicated otherwise. In most circumstances the same antitrust analysis applies to both. *See, e.g., United States v. Connecticut National Bank*, 418 U.S. 656 (1974); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *International Boxing Club of New York v. United States*, 358 U.S. 242 (1959).

The market definition problem in the present case is whether *drive-thru* photo processing is, as found by the district court, a relevant submarket. One of the most important indicia suggested in *Brown Shoe* is whether drive-thru photo processing is offered at prices distinct from other methods of photo processing. This is in essence asking whether there is a low level of cross-elasticity of demand between drive-thru and other methods. The concept of cross-elasticity, defined and explained in the margin,[12] first appeared in the case law in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953), where the Court used it to support its conclusion that advertising in other media was not a close enough substitute for newspaper advertising to be included in the same market. High cross-elasticity between two products suggests that they are in the same market.[13]

The district court found that:

> Retail processing delivered to the amateur photographic consuming public by the drive-thru meth-

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[12]Products that are similar to each other, that are substitutes for each other, display positive cross-elasticity. That is, if the price of *A* remains constant, an increase in the price of *B* will generate more sales of *A* as buyers switch to it. High cross-elasticity means that if the price of *A* remains constant, an *X%* increase in the price of *B* will generate a greater than *X%* increase in the sales of *A*. *See United States v. DuPont & Co.*, 351 U.S. 377, 400 (1956).

[13]This is not always the case. As Professors Areeda and Turner explained:

> Notwithstanding high cross-elasticity between two products at given prices, the producer . . . of one product has market power if he has a significant cost advantage that would persist as he expanded output. [But] since producers with such an advantage will be motivated to cut price and expand their sales, the case will often be taken into account, at least partially, by adjusting market shares to reflect clear trends.

II P. Areeda & D. Turner, Antitrust Law at 371 n.1 (1978); *see also Sullivan* at 56.

od has a very low or no significant price cross-elasticity with other methods of retailing processing.

Fotomat contends that this finding is largely unsupported in the record. We cannot agree. The record indicates that Fotomat's prices for photo processing were approximately 20% or more above conventional forms of retailing. Fotomat's Vice-President of Marketing Services testified that Fotomat's print processing prices were over 50% higher than those of most drug store or discount store services. Yet Fotomat was able to grow despite its significantly higher prices. Similar price differentials were found to be very significant in defining the submarket in *Avnet, Inc. v. F.T.C.*, 511 F.2d 70 (7th Cir. 1975), *cert denied,* 423 U.S. 833. One of the issues in *Avnet* was whether rebuilt or reconditioned used components (auto electrical units such as generators, alternators, etc.) should be included in the same market as comparable new components. This court upheld the F.T.C.'s decision to exclude the used components:

> The Commission found that prices for rebuilt or reconditioned used components varied from 25% to 50% below the prices of comparable new items. Moreover, it noted the absence of any substantial interaction in price between the two lines. These factors are sufficient to support the finding that they should be placed in different submarkets.

Id. at 77. *See also Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc.*, 516 F.2d 1092, 1100 (7th Cir. 1975), *cert. denied,* 423 U.S. 986. Although Fotomat argues that the record establishes substantial similarity and interaction in

prices between drive-thru and other retailers of processing, it has failed to provide any citation to the record in support of this argument, and in our independent review of the record we have not discovered any. Therefore, Fotomat's ability to change distinctive prices, albeit not determinative of a submarket,[14] is an important factor suggesting that the district court's delineation of a submarket was correct.

Because a primary aspect of the service at issue, photo processing, is nearly identical whether done by drive-thru kiosks or conventional retailing methods, we might have been inclined to afford the price differential less weight than in other situations where the products appear to be less similar. Our inclination derives from the possibility that the reason for the price differential may be price-insensitive consumers. *Cf. Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 28 & n.22 (3d Cir. 1978), *cert. denied,* 99 S.Ct. 214 (1978). However, since there is no conclusive evidence that consumers in this market are price insensitive, we must afford the price differential its due weight. Moreover, a closer analysis of the products show that although the end product of the drive-thru and the conventional method is nearly identical, the total service is quite different.

The differences in the total service provided by drive-thru as compared to conventional retailing are reflected by industry perception of the drive-thru submarket as a separate economic entity, another *Brown Shoe* factor suggesting a relevant submarket. The district court found that "the drive-thru retail photographic process-

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[14] *See United States v. Continental Can Co.*, 378 U.S. 441, 455 (1964); *Beatrice Foods Co. v. F.T.C.*, 540 F.2d 303, 310 (7th Cir. 1976).

ing business has achieved recognition within the photographic industry as a separate method of doing business and a separate market." More important than industry perception is consumer perception. Expert testimony indicated that consumers do treat drive-thru as a separate submarket. The convenience and service of drive-thru kiosks apparently segregate them from other forms of retailing. Consumers are willing to pay a premium for the convenience of drive-thru service. And the Fotomate, with whom a customer deals, is more of a specialist than salespersons in many drug stores or discount stores that offer photo processing.

Another *Brown Shoe* factor, "specialized vendors," also supports the district court's finding of a drive-thru submarket. It is quite clear that kiosks are a specialized method of retailing distinct from other conventional methods.

Fotomat is disturbed by the district court's finding of a drive-thru submarket in view of the fact that the district court found that a given customer might purchase photo processing from both drive-thru and conventional retailers depending on which is more convenient under the circumstances. Fotomat suggests that this precludes the existence of a submarket. We cannot agree. The law does not require an exclusive class of customers for each relevant submarket. *See, e.g., United States v. Aluminum Company of America,* 377 U.S. 271 (1964) (the Court recognized a distinction between markets for insulated aluminum and insulated copper wire despite the fact that the same customers brought each for similar purposes). Moreover, in the present case it is significant that at a given time a customer who finds a kiosk convenient will use it regardless of its higher prices.

Recognizing that in defining the relevant submarket the legal "guidelines offer no precise formula for judgment and [that] they necessitate, rather than avoid, careful consideration based on the entire record,"[15] we conclude that the district court properly defined the relevant submarket.

B. *Specific Intent & Conduct*

Having affirmed the district court's delineation of the drive-thru submarket we turn now to the issue of whether Fotomat intended to monopolize the market. Although the case law contains some confusing dicta regarding the need to prove specific intent in an attempt to monopolize case, the Supreme Court has stated that:

> While the completed offense of monopolization under § 2 demands only a general intent to do the act, "for no monopolist monopolizes unconscious of what he is doing," a *specific intent* to destroy competition or build monopoly *is essential* to guilt *for* the *mere attempt* now charged.

Times-Picayune Publishing Co. v. United States, 345 U.S. at 626. *Accord, United States v. Griffith,* 334 U.S. 100, 105 (1948). Although the specific intent

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[15]*United States v. Continental Can Co.,* 378 U.S. 441, 449 (1964). We note also that although in *Brown Shoe* and *DuPont* relatively expansive markets were found to be appropriate, subsequent Supreme Court opinions have recognized narrower markets. Thus, in *International Boxing Club, Inc. v. United States,* 358 U.S. 242 (1959), the Court held the relevant market to be the promotion of championship boxing contests in contrast to all professional boxing events, despite the claimed physical identity of the products involved. *See also United States v. The Connecticut National Bank,* 418 U.S. 656 (1974); *United States v. Grinnell Corp.,* 384 U.S. 563 (1966); *Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc.,* 516 F.2d at 1094.

requirement has been criticized, *see, e.g.*, Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Mich. L. Rev. at 398-400 (1974); III P. Areeda & D. Turner, Antitrust Law ¶822 (1978), and the requisite proof to establish it is not well-settled, the district court found, and the record supports its finding of, the requisite intent, and Fotomat has not argued error in this regard.

Fotomat directs its argument to the district court's finding of predatory conduct and contends that either the finding is not supported by the record or that its conduct was not the sort which is proscribed by the antitrust laws. Photovest's theory, accepted by the district court, was that when Fotomat determined that owning the kiosks was more profitable than franchising them, Fotomat, among other things, saturated the market with company-owned kiosks to reduce severely the profitability of Photovest's kiosks and thereby attempted to reduce substantially the value of Photovest's kiosks so that Fotomat could buy them at a low price. Saturating the market was not the only method that Fotomat used, according to the district court, to reduce the profitability of Photovest's kiosks. It found that Fotomat engaged in the following conduct in an intentional attempt to do so:

> concealment of discounts available from processors, retention of discounts from processors, the markup of film, the placement of company stores in such a manner as to siphon business from plaintiff, attempts to coerce plaintiff into remaining with Carhart, refusal to relocate losing stores, insistence on escalating rents and a number of miscellaneous found facts. Each of these was designed to reduce plaintiff's profits for purposes of reacquiring plaintiff's stores at the lowest possible price.[16]

Although we will discuss only the primary components of Fotomat's attempt to monopolize, an analysis of these components requires a thorough review of the factual context in which they occurred.[17]

From its inception in 1967, Fotomat intended to "blitz the industry," that is, to preempt the desirable sites for drive-thru kiosks nationally. Because it did not have a vast capital supply with which to do this, it established a franchising arrangement to provide capital and operating management for its rapidly expanding network and to permit simultaneous development of many metropolitan areas. During its initial years of operation, the bulk of Fotomat's revenue was derived from the sale of franchises, not from operations.

By about June 1969, Fotomat concluded that the profits it derived from company-owned kiosks were significantly greater than those it derived from franchised stores. After 1969, no significant franchise sales were made except to fulfill commitments to "block" franchisees who had rights to purchase additional stores. In 1971, a new franchise relations director was employed by Fotomat with instructions to "work himself out of a job."

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[16]Beginning in May 1968, Fotomat's franchise agreements contained a buy-back option by which Fotomat was entitled to repurchase the franchise after three years at a price equal to the greater of $50,000 or 5 times the total net profit for the 12 month period preceding exercise of the option.

[17]Although this factual discussion is taken primarily from the district court's opinion, we have found that the record supports it.

The franchise arrangement with Photovest began in 1968. The investors who ultimately formed Photovest responded to an advertisement in the Wall Street Journal in which Fotomat solicited the purchase of franchises in several states including Indiana. The Photovest principals made two trips to Fotomat's headquarters in La Jolla, California, where they were given an extensive sales talk. Fotomat represented that each store had a "market area" consisting of the geographic area from which the store drew its customers and that as a general rule no store would be constructed within two miles of any existing store so as not to infringe on the market area of the existing store. It represented that it would select sites for the franchisees based on sophisticated demographic studies which it and others had conducted. It also represented that two stores would not overlap each other's market areas because Fotomat's royalties applied only to receipts of stores in excess of $2,500 per month and thus Fotomat could not afford to have overlapping in market areas. It described a store sales level of $60,000 per year as "modest," $90,000 per year as "satisfactory," $120,000 per year as "above average," and $150,000 per year as "high." Fotomat estimated that the Marion County (Indianapolis) areas would support fifteen stores which it identified as the "saturation" level of the area.[18] It told the investors that it would provide the franchisee with

[18]In October 1968, after Photovest purchased the fifteen franchises in Marion County, Fotomat placed an advertisement in the Wall Street Journal soliciting the purchase of franchises in certain midwestern cities. The ad stated that Fotomat was "one of the fastest growing franchise systems in the nation" and that "only a few key franchise areas are still available." The ad prominently displayed the names of various midwestern cities, including Indianapolis, with a line drawn through the name and the notation "sold out."

essential support services, including daily pickup and delivery of film, customer service, administrative support, kiosk maintenance and complete merchandising support.

On August 26, 1968, Photovest signed a master franchise purchase agreement obligating it to purchase fifteen franchises to operate fifteen Fotomat stores in Marion County, Indiana. Each store was made subject to the standard Fotomat franchise agreement and the standard Fotomat lease agreement which would be separately signed when each store was opened. Photovest agreed to pay $21,000 for each franchise. The price was payment for use of Fotomat's trademark name, a small amount of equipment, original inventory, and miscellaneous items of a value less than $1,000. Photovest also agreed to pay Fotomat as a royalty and continuing franchise fee 12% of the franchisee's gross sales in excess of $2,500 per month. The franchisee was required to pay Fotomat an additional 3% of all gross sales to be "expended by Fotomat for the purpose of advertising, public relations, and the promotion of the total franchise operation."

The agreement expressly required that the franchisee "purchase all merchandise, photo-processing services and other services from Fotomat or from such other sources as have been approved in writing by Fotomat." But Fotomat agreed to sell "all film and film processing" to the franchisee "at Fotomat's cost without any markup whatsoever." If Fotomat itself entered the photo processing business, it could charge the franchisee for its photo processing services, but only at such rates as "shall be comparable to or less than those prevailing in the industry in operator's general market area."

The agreement required Photovest to lease the store from Fotomat at a rent of $375 per month with a cost-of-living escalator effective after five years. Expiration or termination of the lease would terminate the franchise. Fotomat agreed to perform "general services including frequent pickup and delivery of film, frequent delivery of inventory, maintenance of inventories, and regular merchandising services." The term of the franchise was ten years with renewal options for three additional five year periods upon payment of $7,000 per period. Photovest had a right of first refusal which could be exercised on any additional stores Fotomat offered for sale in Marion County.

1. *Saturating the Market*

In 1971, Fotomat's executives in charge of site selection believed that Fotomat had an obligation to the franchisees "to not intentionally pull customers from [the franchisee's] operating stores to ours [company stores] and to act in good faith in the performance of our positioning of the units relative to franchised stores." These beliefs and the understanding or informal policy against "overlaps" of franchised stores were based on Fotomat's knowledge of the basis on which the franchises were sold. As of June 16, 1971, there were eighteen Fotomat stores in the Indianapolis vicinity; fifteen were Photovest's franchised stores, all located in Marion County, and three were company stores located in adjoining counties.

In about 1972, Fotomat began to modify its previous procedures and began to overlap franchised stores on a systematic basis. In 1973, Fotomat devised a "four point program" in response to a Kansas City franchisee's objection to Fotomat's placement of stores in proximity

to a franchised store. The program provided that if a store were opened within two miles of a franchised store, the franchisee could either (1) buy a franchise for the store for $21,000 and take a lease at $375.00 per month, (2) choose either unit within six months of the opening of the new unit, (3) sell the franchised unit back to Fotomat "at a negotiated price" (Fotomat represented that the franchisee could choose a unit if, after a sufficient time, it is determined to close one of the units), or (4) do nothing. This four point policy was not disclosed to Photovest until June 1974, when a store was placed in Indianapolis within one and one half miles of one of Photovest's best stores with an annual sales volume of $88,471. Photovest did exercise the option to buy, and that store became its sixteenth store. It believed at the time that the location was not good, but hoped to deter Fotomat from placing additional overlapping stores in Marion County and purchased to "set a precedent."

In 1974, two other stores were installed within two miles of a Photovest store. Neither was offered to Photovest under the four point program, and when such omission was called to Fotomat's attention, its response was to ignore Photovest's requests. Beginning on October 17, 1974, and up to the date of trial of this case, Fotomat opened ten more stores in and around Marion County. In March 1975, in its next four option offer, Fotomat announced that the price for a franchise store was now $30,000 and the required monthly rental would be $500 per month. It was not economically feasible for Photovest to accept new stores on those terms, a fact which was known to Fotomat. Since March 1974, Fotomat has opened fourteen new stores in the Indianapolis metropolitan area. Twelve

of these represent new sites, while two of them are relocations. Over one-half of the new stores since 1973 have physically overlapped existing stores in Marion County, Indiana.

Prior to the effect of the overlaps, three Photovest stores had attained all-time sales highs in excess of $90,000 per year, and two others exceeded $80,000. Although all were growing, by trial Photovest's best store was at $70,576, and like most other stores, was dropping sharply. Photovest's annual sales reached $1,071,670 in the year the overlaps started, and the most recent data available at trial showed its annual sales at approximately $900,000, even with a sixteenth store. As of January 1977, ten of Photovest's stores were below Photovest's overall breakeven point, and five were below the incremental breakeven point of $50,000.[19] By trial, Photovest was incurring substantial losses. It was valued by professional business appraisers as worthless and the district court agreed.[20]

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[19]Photovest's breakeven point is $55,000 exclusive of general overhead and $65,000 after all expenses. The incremental breakeven point (i.e. the point at which sales exceed the direct costs of the particular store and begin to contribute to general overhead) is $50,000 for a franchised store. Because a franchised store must pay royalties, advertising fees and rents, which company stores do not pay, the breakeven point of a company store is significantly lower. For example, the incremental breakeven point for a company store is $21,000 to $25,000.

[20]Fotomat argues that the district court's finding that Photovest's franchises were worthless is inconsistent with its finding that sales dropped "a mere 15%" from 1975 to 1977. These findings are not inconsistent since Photovest had relatively high fixed costs and relatively slim profit margins per store. Thus a 15% drop in sales could mark the difference between a profitable enterprise and a bankrupt enterprise. This is also supported by the fact that franchisees would buy blocks of franchises so that a minor drop in the sales at one or two stores could be temporarily absorbed by the other stores in the block.

The district court found that the new company stores were the principal cause of the decline in Photovest's sales. The record supports this finding.

Thus the critical issue in this regard is whether this conduct, albeit destructive of Photovest's profit levels, is proscribed by § 2 of the Sherman Act. Fotomat poses the issue as whether the antitrust laws are violated by locating a store close to a competitor in the hopes of taking some customers from the competitor. It argues that the law does not proscribe such behavior because the antitrust laws specifically encourage competitive store locations and condemn competitors who allocate territories among themselves. It attempts to draw support for its arguments primarily from three cases, none of which we find provides persuasive support. *National Society of Professional Engineers v. United States*, ... U.S. ....., 98 S.Ct. 1355 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611 (1972).

Topco Associates was a cooperative association of regional supermarket chains. Its basic function was to serve as a purchasing agent for its members and to obtain for them high quality merchandise under private labels to make them competitive with larger national and regional chains. The Government sued Topco under § 1 alleging that it combined and conspired with its members to enforce territorial allocation of markets. The territorial allocations effectively insulated members from competition in Topco-brand goods. The Court found the arrangement to be a per se violation of § 1 and was not persuaded to the contrary by the district court's determination that the agreements among members allowed them to compete more effec-

tively with the large supermarket chains. The district court had found for Topco in part because "by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains." 405 U.S. at 610.

Fotomat argues that the Supreme Court's rejection of this reasoning suggests that the antitrust laws could not proscribe its adding stores in Indianapolis which overlapped the market areas of Photovest franchises.[21] This quantum leap in legal reasoning ignores an important aspect of antitrust analysis. Fotomat's reasoning ignores the whole concept of predatory practices which was not an issue in *Topco*. Many predatory practices promote competition in the short run, but if they are used to effect a monopoly by eliminating competition, they are illegal under the Sherman Act. The enforcement of § 2 of the Sherman Act will often result in a sacrifice of the most competitive conduct in the short run if the ultimate goal of that conduct is the establishment of monopoly power.

In *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 119 (1948), the Court sustained district

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[21]Fotomat seems to suggest that if it respected the market areas and did not open overlapping stores, it might be subject to antitrust prohibitions against territorial allocations. But in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 n.26 (1977), the Court, in rejecting the inherent illegality of territorial allocations, stated:

> We also note that *per se* rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen.

court findings that the defendant "made threats to build theaters or to open closed ones in order to force sales of theaters in various towns or to prevent entry by an independent operator." The Court stated that the district court was justified in drawing the inference of unlawful purpose from this conduct. *Id.*

More recently, the Third Circuit found that there was sufficient evidence from which the jury could have found a § 2 violation, part of that evidence being the defendant's intentional location of a competing factory in the immediate vicinity of the plaintiff's plant. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir. 1978). Each defendant's conduct in *Schine* and *Columbia Metal* may have promoted competition in the short run, but that did not foreclose the possibility of antitrust liability. Fotomat's citation of *Brunswick*[22] and *National Society of Professional Engineers* is unpersuasive for the same reasons.

Fotomat also contends that the evidence of record does not support the findings that it expanded in the Indianapolis market for anticompetitive purposes. It relies in great part on the fact that the franchise agreement did not contain a provision prohibiting it from opening new stores which overlapped Photovest's franchised stores. But a party's right to sue for antitrust violations is not dependent on the existence of a contract provision prohibiting the alleged anticompetitive behavior. Moreover, the record in this case clearly supports the district court's findings regarding Fotomat's purpose in locating new stores in Indianapolis. One example

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[22]*See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 831-32 & n.14 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1267.

of support for this finding is Fotomat's location decisions for its new stores in Indianapolis. It opened new stores in close proximity to Photovest's best stores. One of Photovest's best stores was devastated by Fotomat's opening of three new stores in its immediate market area. One of these new store's sales never exceeded Fotomat's incremental breakeven point and by trial were well below it. Notwithstanding Fotomat's operations personnel recommendations to remove it, Fotomat did not close it, apparently willing to lose money in the short run hoping to reduce the profitability of Photovest's store for future buy-back. Indeed, after being bracketed by these three new stores, Photovest's store's annual sales of $88,000 dropped 40%. A Fotomat internal memorandum written by an area manager establishes that Fotomat "anticipated" that the new store would "siphon" volume from Photovest's store.[23] Also, it should be remembered that Fotomat's conduct regarding new store locations must be viewed along with its other behavior which in total was found to support a § 2 violation. Otherwise lawful practices may become unlawful if they are part of an illegal scheme. *See Schine Chain Theatres v. United States*, 334 U.S. at 119.

2. *Processing Discounts and Film Markups*

Another part of the scheme by Fotomat to reduce the profitability of Photovest's stores so that they would eventually be less expensive to buy back was Fotomat's

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[23]Other indications of Fotomat's purpose in adding numerous stores in Indianapolis include the fact that Fotomat was well aware that "the more profitable the franchise is, the more expensive and difficult it is to reacquire it," and that the franchise relations director was hired "to work himself out of a job."

concealment of and retention of discounts it obtained on processing and its markup of Fotomat brand film.

The franchise agreement obliged Fotomat to sell all film and processing to Photovest "at Fotomat's cost without any markup whatsoever." The arrangement between Fotomat and its processors involved processing prices stated in tiers of discounts from the retail price. For example, if the retail price was $1.00 and Fotomat was given a discount of 47% plus 10%, its wholesale price would be $0.477 ($1.00 ± 47% = $0.53; $0.53 ± 10% = $0.477). Over the years, the second tier discount increased. Fotomat passed on the first tier discount to Photovest but retained the second tier discount. Since the discount terms granted to Fotomat by its processors were highly confidential, Photovest was unaware of Fotomat's retention of the second tier discounts. These discounts ultimately rose to 12% for print and 21.6% for chrome and were secretly retained by Fotomat, as the district court found, both in violation of the contract, and for the purpose of reducing Photovest's profitability.

Similarly, Fotomat introduced private label Fotomat brand film which Fuji and GAF manufactured and sold to Fotomat. Fotomat then sold it to Photovest at prices 7% to 26% above its cost, in violation of the franchise agreement and as part of its scheme to reduce Photovest's profitability.

3. *The Processing Tie*

The master franchise agreement gave Photovest the option to purchase processing from Fotomat or "such other sources as have been approved in writing by Fotomat." But twelve of the individual franchise agreements signed on the opening of new stores from De-

cember 30, 1968, through 1971 deleted all reference to "approved sources" and required processing to be purchased from Fotomat. In June 1971, Fotomat informed all franchisees that they could use any processor they wished despite the contract provision.

In the summer of 1974, Photovest began looking for another print processor because of quality problems with Carhart (Fotomat's processor). In September, Photovest informed Fotomat that it intended to switch its print processing to Colorcraft. Fotomat demanded that Photovest also change its chrome processor and perform its own pickup and delivery and customer service, despite the fact that Fotomat was contractually required to provide both pickup and delivery and customer service in return for royalty payments from Photovest. Although Fotomat's refusal to perform pursuant to the contract exerted pressure on Photovest to stay with Carhart, Photovest persisted and ultimately signed a contract with Colorcraft.

The pressure Fotomat exerted on Photovest to stay with Carhart put Photovest in a no-win situation. Either it stayed with Carhart and lost the discounts that Fotomat wrongly retained and suffered the loss in sales resulting from inferior quality processing, or it switched processors and lost the customer service and pickup and delivery services which Fotomat threatened to terminate.[24] Either choice subjected Photovest

[24]The yearly cost of pickup and delivery in Indianapolis was about $23,000 during 1974, approximately 50% of Photovest's annual profit in 1974. The cost of customer service was $7,000 per year.

to an economic loss which contributed to Fotomat's plan to reduce Photovest's profits.[25]

C. *Dangerous Probability of Success*

Having agreed with the district court's delineation of the relevant submarket, it is quite clear that there was a dangerous probability that Fotomat would succeed in monopolizing the market.[26] The only related issue worthy of discussion is whether Fotomat's control of the market via buy-back of the Photovest franchises would change the competitive dynamics of the market. Fotomat argues that since Photovest always followed Fotomat's recommended pricing, the buy-back would have no effect on the pricing of the goods or services in the relevant market. It argues that the same amount of photo processing would be done whether Photovest or Fotomat owned the Indianapolis drive-thru kiosks, and that the number of sites preempted by Fotomat stores would remain constant.

[25]The district court found that one of the contributing factors to Fotomat's attempt to monopolize was its refusal to settle this litigation. It stated: "In sum, this litigation itself has been utilized by defendant as an instrument to drain plaintiff for purposes of ultimately buying plaintiff out at an inadequate price."

We are of the opinion that the district court erred in considering this as a factor. See our discussion of this issue in section V.A., *infra*. Consequently, on remand the district court must reconsider the damage award for the § 2 violation. The award must be reduced by $72,267 (the $24,089 litigation expenses trebled.).

[26]Fotomat and Photovest together had 30 of the 39 drive-thru outlets at the conclusion of the trial. Fotomat's regional director estimated Fotomat's and Photovest's aggregate share of sales in 1975 at 95% of the Indianapolis drive-thru market.

We are unpersuaded by this argument because it proceeds on the assumption that Fotomat's pricing behavior is not influenced by the existence of Photovest franchises and thus that if Fotomat succeeded in buying back all the Photovest franchises and obtaining a monopoly, it would not change its pricing policies. Antitrust analysis does not recognize as a defense the possibility that if a defendant obtains a monopoly, he might nevertheless not abuse his monopoly power to extract monopoly profits. The recognition of such a defense in an attempt to monopolize case would devastate the impact of § 2.

The fact that Photovest has always followed Fotomat's suggested prices does not suggest, as Fotomat implies, that the same prices would be charged if Fotomat succeeded in buying back all Photovest stores. The forces of competition may well be restraining Fotomat's recommended prices to its franchisees. The franchisees are not bound to follow these *recommended* prices. Without the restraints of competition, a monopolist often will find that it can maximize profits by selling a lower volume at higher prices than would prevail in a more competitive market. We cannot reverse the district court's finding of a § 2 violation on the ground that Fotomat may not, if given the opportunity, follow the path of many monopolists. Accordingly, we affirm the district court's conclusion that Fotomat violated § 2 of the Sherman Act.

III. THE TYING ARRANGEMENTS

The district court found that Fotomat engaged in illegal tying arrangements involving both photo processing and leasing of kiosks. The photo processing tie was held to be in violation of § 1 of the Sherman

Act and its state law counterpart, Ind. Code § 24-1-2-1. The lease tie was held to be in violation of only this state statute apparently because of lack of sufficient effect on interstate commerce.[27]

A. *The Photo Processing Tie*

The district court held that:

> Defendant's securing of plaintiff's agreement to purchase print processing from defendant, by means of the franchise agreements, defendant's concealment of its discounts from processors, and its policies with respect to plaintiff's use of independent processors, constitutes an unlawful restraint of trade in violation of Section 1 [and Ind. Code § 24-1-2-1].

Initially, the tying arrangement was part of the franchise agreement. From 1968 to 1971, twelve of the Photovest franchises included a contractual clause prohibiting Photovest from buying processing from anyone other than Fotomat.[28] Then in June 1971, Fotomat wrote to its franchisees, apparently with knowledge of the then recent opinion in *Siegal v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), advising them that they could use any processor they wished despite the provision in

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[27]Ind. Code § 24-1-2-1 is patterned after § 1 of the Sherman Act and Indiana courts have looked to decisional law under § 1 to interpret § 24-1-2-1. *See Orion's Belt, Inc. v. Kayser-Roth Corp.*, 433 F. Supp. 301, 302-03 (S.D. Ind. 1977); *Citizens National Bank of Grant County v. First National Bank in Marion*, 331 N.E.2d 471, 478 n.5 (Ind. App. 1975).

[28]The other four Photovest franchises were subject to clauses which prohibited Photovest from purchasing its processing from anyone else without written approval of Fotomat.

their agreements to the contrary. This letter, however, also assured the franchisees that Fotomat was selling processing at its cost without any markup whatsoever. Fotomat then adopted a policy that any franchisee who did switch print processors would have to supply its own pickup and delivery and would have to switch chrome processors. When Photovest decided to switch processors in September 1974, Fotomat responded, consistently with this policy, by demanding that Photovest change its chrome processor and do its own pickup and delivery and customer service.

The district court apparently concluded that an illegal tying arrangement existed from the inception. Although the district court did not analyze the alleged tying conduct in temporal segments, we find it instructive to view the conduct in three segments: (1) prior to the June 1971 Chicken Delight letter; (2) from June 1971 to September 1974; and (3) after September 1974.

In period one, prior to the June 1971 letter, the tying arrangement is clear, at least as to twelve of the sixteen Photovest franchises. These franchise agreements required Photovest to purchase its processing from Fotomat. Thus Fotomat tied the sale of processing to the franchise itself. A tying arrangement is defined as:

> an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, ... They [tying arrangements] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. . . .

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958). The law is well-settled that a franchise license itself can be the tying product. In *Northern v. McGraw-Edison Co.,* 542 F.2d 1336, 1345 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977), the court stated:

> A franchise license constitutes a separate and distinct marketable item. The weight of judicial authority supports the proposition that if prospective franchisees are compelled to purchase equipment or other tied products in order to obtain the franchise and trademark, an illegal tying arrangement exists.

Accord, Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971); *Siegal v. Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

In the present case, Fotomat's considerable economic power in the tying product, the trademark/franchise, was used to restrain competition in the processing market. Competing processors were effectively blocked from competing for Photovest's processing needs, a not insignificant amount of processing.

As to the four Photovest franchises which were permitted to purchase processing from Fotomat-approved sources, the tying arrangement was not established sufficiently. Photovest did not show that Fotomat unreasonably withheld approval. Indeed, it appears that Photovest never submitted a processor to Fotomat for approval during this time period. Photovest contends that the tie was nevertheless sufficiently established because Fotomat did not provide a list of approved processors. This does not in our opinion establish the requisite

condition for illegal tying. Given the contractual language, which at least provides for the possibility of purchasing processing from non-Fotomat sources, we are reluctant to find a tying arrangement without some evidence that Fotomat applied the contract language so restrictively as to constitute a de facto tying clause. "The presence of the illegal condition may be inferred from an extrinsic course of conduct supplementing the written contract," *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), but in the present case Photovest has failed to provide evidence of any conduct from which to infer the tie. Accordingly, we are of the opinion that the district court erred in including these four franchises in the tying arrangement for the period before June 1971.

In period two, from June 1971 to September 1974, we are again unable to agree with the district court's finding of a tying arrangement. Photovest's theory, which persuaded the district court, was that notwithstanding the "Chicken Delight" letter of June 1971, Fotomat's fraudulent representation to Photovest that it was offering processing at its cost without markup, induced Photovest to continue to purchase its processing from Fotomat's processor (Carhart). When Fotomat informed its franchisees that they could purchase processing from whomever they wished, it also assured them that it was offering them processing at its cost. Photovest argues that it had no reason to look elsewhere for processing since it assumed it was receiving its processing at Fotomat's cost and that Fotomat had substantial buying power. From this premise, Photovest concludes that Fotomat tied its processing to its trademark/franchise. It is at this step in the reasoning that Photovest's argument fails.

In essence, using Photovest's reasoning, we would find an illegal tying arrangement whenever a franchisor tells a franchisee, "You can buy your supplies from whomever you desire, but my prices are lower (knowing that its prices are not lower)." This cannot constitute an illegal tie because a tying arrangement requires that the defendant use his economic power in the tying product to coerce the plaintiff to purchase the tied product on terms the plaintiff would not otherwise accept but for his desire to obtain the tying product. *See, e.g., Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 (5th Cir. 1977); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1326-31 (5th Cir. 1976). Photovest did not purchase processing from Fotomat because of Fotomat's power over the trademark/franchise. Rather it purchased from Fotomat because of Fotomat's untruthful representation that Fotomat was selling at cost. Fotomat's untruthful representation may constitute breach of contract or fraud or other state law violations, but it cannot constitute the missing link in an illegal tying arrangement.

Photovest cites *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1964), *cert. denied* 397 U.S. 920 (1970), in support of its tying theory which appears to be a tying by lying theory. SCM manufactured and sold office copying machines and the paper and other supplies used with the machines. The plaintiff was a distributor of paper and supplies for copying machines, but distributed a different brand of paper and supplies. The court held that SCM tied its paper and supplies to its service contracts. Its service contract stated, "Because SCM photocopy machines are designed to give excellent performance with SCM photocopy supplies, . . . SCM

reserves the right to suspend this agreement as to any machines in which other suppliers' paper or other supplies have been used. . . . [and] [t]his agreement shall not apply to any repairs made necessary by the use . . . [of] supplies made by other than SCM and not approved by SCM for use in SCM equipment." *Id.* at 64. SCM never approved any competitive paper for use in its machines even though it knew that the plaintiff's paper was safe and as effective as SCM paper for such use. Moreover, SCM representatives deliberately misrepresented to customers that use of plaintiff's supplies "would cause service calls and interrupt the continuous operation of their machines," and threatened cancellation of rental agreements with customers who used non-SCM supplies in their SCM machines. The court held that both the restrictive contract language and the conduct designed to enforce the illegal restrictions violated the Sherman Act. *Id.* at 66.

From this holding, Photovest tries to distill a rule that fraudulent inducements to purchase made by a defendant with market power in one product will entail an illegal tie. This goes too far. *SCM Corp.* is distinguishable from the present case because SCM threatened, both by contract and by conduct, to terminate its customers' access to the tying product (either the service and maintenance of SCM copiers or the rental or lease of the copiers themselves) if the customers failed to use the tied product (SCM paper and supplies). The fraudulent misrepresentations were used merely to justify to its customers its enforcement of the tie. In the present case, however, the fraudulent misrepresentations stood alone; they were unaccompanied by either contract language or conduct which was invoked to enforce a tie. Fotomat did not threaten

to terminate the franchise if Photovest refused to use Fotomat's processor. It merely misrepresented the value to Photovest of using that processor. Indeed, the fraud was not linked in any significant way with the tying product.

The principal evils of tying arrangements are the foreclosure of competitors in the tied product market and the denial to buyers of the advantages of marketplace shopping. *See Northern Pacific Ry. Co. v. United States,* 356 U.S. at 6. These evils do not arise in the present case because competitors in the processing market were free to lure Photovest's business by offering their services at lower prices than Carhart, and Photovest was free to solicit such bids. That these parties failed to do so may be attributable to poor business judgments or to torpid competitors in the processing market, or even to Fotomat's fraudulent misrepresentations, but not to Photovest's fear of losing the tying product (the franchise or whatever else might be characterized as the tying product). Accordingly, we are of the opinion that the district court erred in finding an illegal tying arrangement during this period.

In period three, after September 1974, we agree with the district court that Fotomat engaged in an illegal tying arrangement. It was during this period that Photovest informed Fotomat that it was switching print processors. Fotomat's response, including its demand that Photovest switch chrome processors and that it perform its own pickup and delivery and customer service, constituted the illegal tie.[29] It tied

[29]Photovest contends that Fotomat's conduct in response to Photovest's desire to switch processors was a consistent policy that Fotomat had developed since June 1971. However,

(This footnote is continued on next page)

its print processing to its contractual duties to perform specific and costly services. Since Photovest could not obtain the tied services elsewhere (free of charge), Fotomat had appreciable economic power in the tying product. We also note that Fotomat's pressures to induce Photovest to purchase processing only from its processor were not grounded on quality control considerations. *See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d at 376.

The damages computed by the district court on these tying claims under counts I and III must be recomputed on remand consistent with foregoing portion of this opinion.

B. *The Lease Tie*

The district court held that the contractual requirement that Photovest lease its kiosks from Fotomat constituted an illegal tying arrangement. The franchise agreements stated: "As an express condition of this agreement, Operator must continue as a lessee of a Fotomat Merchandising Island. Operator hereby agrees that the lease executed between Fotomat and Operator contemporaneously with this Agreement is pertinent to this Agreement and expiration or termination of the lease, in accordance with its terms, shall have

Photovest was unaware of this alleged policy until period three. Thus this policy cannot be used to extend the tying violation into period two.

Even if there were sufficient evidence that during period two Fotomat would have responded to Photovest's attempt to change processors in the same manner as Fotomat responded after September 1974, we would not extend the tying violation to include period two because Photovest could not have proved that it was coerced to stay with Carhart because of its desire to receive the tying product (the pickup and delivery services, etc.) since it was totally unaware that the tying product was conditioned on staying with Carhart.

the effect of terminating this Franchise Agreement." Photovest paid $375 per month for each kiosk and land until 1973 when the contractual rental escalator permitted Fotomat to raise the rent to $500 per month which it did. The district court found that there was no operational reason why Photovest could not have either constructed its own kiosks or purchased them outright from Fotomat. It found that Photovest was capable of locating suitable sites and negotiating ground leases had it been permitted to do so under the franchise agreements. It also found that Photovest incurred no damages from the leasing requirement until Fotomat raised the rent to $500.

The tying arrangement here is quite clear. The express language in the franchise agreement setting forth the condition constitutes a prima facie case. *See, e.g., Schuler v. Better Equipment Launder Center, Inc.*, 74 F.R.D. 85 (D. Mass. 1977). A tie involving real estate is just as unlawful as any other tie. *See Carpa v. Ward Foods, Inc.*, 536 F.2d 39, 50-51 (5th Cir. 1976); *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 365 (7th Cir. 1971).

Fotomat argues that the lease tie was rebutted by the facts that Photovest desired to purchase a "turnkey operation," a complete package including land and kiosks, and that Photovest never sought to lease land on its own. These facts, however, do not rebut the proposition that Photovest was coerced by Fotomat's appreciable market power in the franchise to accept the leasing provision. That Photovest desired a complete package does not alter the proposition that were it not for its desire to obtain and retain the franchise it would not have agreed to the leasing provision. Indeed, Fotomat could have offered a "complete pack-

age" without conditioning the franchise on the leasing arrangement. It could have made the leasing arrangement optional. The fact that Photovest never sought to lease land on its own is rather obviously the result of the restrictive contract and the fact that Photovest valued the franchise and did not choose to jeopardize the franchise by violating the lease clause. Furthermore, Fotomat offers no evidence to indicate that during the time period for which the district court computed damages Photovest was uncoerced. Fotomat directed its argument only to the time at which the parties entered the franchise agreement.

Fotomat's final argument regarding the tying arrangements deserves little attention. It argues that it lacked any appreciable economic power in the tying product, the trademark/franchise, to permit it to effect an illegal tie.[30] The record shows that in 1968 Fotomat was the only national franchisor of drive-thru photo processing. Its national advertising and the "billboard" effect of its forecasted 5000 stores were substantial advantages. This, in our opinion, shows the requisite economic power in the trademark/franchise. We, accordingly, affirm the judgment as to this issue.

IV. COMBINATION AND CONSPIRACY TO RESTRAIN TRADE

The district court concluded that since March 1972, Fotomat has engaged "in an unlawful combination and conspiracy with its wholly owned subsidiary, Fotomat

[30]The Supreme Court has explained that for purposes of tying arrangements, "appreciable restraint exists whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them. . . ." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503-04 (1969).

Labs, Inc., designed to eliminate plaintiff as a retail competitor of defendant and as an independent purchaser of photo processing in violation of Section 1 of the Sherman Act. . . ."[31]

Fotomat Labs, Inc. (Labs) was incorporated in 1971 as a wholly owned subsidiary of Fotomat. In March 1972, Labs acquired 50% of a joint venture with a subsidiary of Carhart (the independent Indianapolis processor based in New York from which Fotomat purchased print processing) to operate the Indianapolis plant. This joint venture lasted until May 1974 when Carhart again owned the plant independently. By 1974 Labs' wholly owned plants were doing much of Fotomat's print processing throughout the country.

Carhart performed Fotomat's Indianapolis processing from 1968 to February 1972. From February 1972 to May 1974, the joint venture performed the processing. Then from May 1974 to May 1976, Fotomat again used Carhart. It then switched to the Labs plant in St. Louis. In 1974, Photovest switched its processing to Colorcraft, an independent print processor in Louisville.

The object of the Fotomat-Labs conspiracy, as described by Photovest, was as follows:

[31]The district court also held this same conduct violative of Ind. Code § 24-1-2-1. It further held that Fotomat violated § 24-1-2-1 since June 1971, before Labs was on the scene, by engaging in an unlawful scheme and design having the same purpose. The district court apparently was of the opinion that two actors, as required by § 1 of the Sherman Act, were not necessary under § 24-1-2-1. Subsequent to the district court's opinion in this case, the Chief Judge of that district issued an opinion, with which we agree, that states that the Indiana statute does not extend beyond the bounds of federal antitrust law. *Orion's Belt, Inc. v. Kayser-Roth Corp.*, 433 F. Supp. 301, 302-03 (S.D. Ind. 1977). Accordingly, the district court in the present case erred in finding a violation of § 24-1-2-1 before March 1972.

> Fotomat receives roughly twice the profits from a retail outlet that uses Labs rather than an outside processor. . . . [O]ne of the reasons both Fotomat and Labs sought first to deceive and then to coerce Photovest into remaining with Carhart was to keep Photovest "within the Fotomat system" . . . so it could be converted to Labs as soon as Fotomat's contractual commitment to Carhart expired. . . . Fotomat's objective was ultimately to acquire Photovest and thereby obtain for Labs Photovest's volume as a consumer of wholesale processing.

A scheme to force independent dealers out of business pursuant to a plan of vertical integration, if effected through combination or conspiracy, is a § 1 violation. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975). Photovest argues that the Fotomat-Labs plan was just that.

Fotomat attacks this § 1 violation on several fronts. First, it contends that Labs was not separate, distinct, or independent from Fotomat and thus a conspiracy could not have existed with only one member. The problem of intra-enterprise conspiracy often presents difficult issues in defining an economic unit. The Supreme Court has held that two separately incorporated subsidiaries within the same corporate family can conspire. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) ("common ownership and control does not liberate [them] from the impact of the antitrust laws."). *Accord Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951). Separate incorporation, however, albeit an important factor, is not conclusive

proof of the requisite two actors for a § 1 conspiracy. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910. Thus we must decide each case on its particular facts. Some relevant factors to consider include "the extent of the integration of ownership, whether the two corporations have separate managerial staffs, . . . the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, their history, whether they functioned as separate firms before being partially integrated, and finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms." *Sullivan* at 328.

The evidence in the present case shows that Labs was separately incorporated to minimize potential for labor relations friction which might arise from the disparity in benefits between employees of photo processing labs and existing Fotomat personnel. The executive management of Fotomat overlapped that of Labs. Moreover, Labs did not maintain separate corporate offices. Profit-related compensation for the Labs personnel was calculated solely in terms of the profitability of Fotomat rather than in terms of an appraisal of Labs' independent net income. For all external purposes, financial statements and tax return data were consolidated. In publicly circulated financial statements, all subsidiaries of Fotomat were lumped together with the parent and referred to simply as "the Company." Historically, Labs was formed to integrate photo processing services into Fotomat owned processing facilities and never existed for the independent purpose of establishing a processing business to service non-Fotomat customers. It acted merely as the processing arm of the enterprise.

In response to this substantial evidence that Fotomat and Labs were not separate entities for antitrust purposes, Photovest offers only two statements, one by Fotomat's in-house counsel in which he said that Labs has independent personnel, laboratories, machinery, equipment and costs and that it bills Fotomat just as independent processors do, and another by Fotomat's president in which he said that Labs "was a separate business and we elected to treat it as such." The fact that Labs billed Fotomat for processing and had separate costs, machinery, equipment, etc., is not very significant other than as evidence that separate accounting made for internal accounting clarity. And the isolated statement by Fotomat's president cannot be given great weight.

We would be more comfortable in deciding this issue if we had a more thorough record in this regard. It is rather curious that the record is extremely thorough, in fact overwhelming, in almost every other aspect of this case. Nevertheless, on the basis of the record before us, we are of the opinion that for antitrust purposes, Fotomat and Labs were really one entity and thus could not have conspired in violation of § 1. The fact that Labs was separately incorporated and the statements of Fotomat's president and in-house counsel are not sufficient to overcome the more substantial evidence indicating that Labs was merely a service arm of Fotomat, more like a corporate division than a separate corporate entity. To find the two actors necessary for a § 1 conspiracy in this case would not be significantly different from holding, contrary to good authority, that a corporation can conspire in violation of § 1 with its wholly-owned, unincorporated sales division, *see H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978), and we do not intend in the present case to lead a movement toward a single-firm conspiracy doctrine.[32] Accordingly, we reverse the district court's finding of a § 1 conspiracy to restrain trade on the ground that Fotomat and Labs were not two separate economic entities for purposes of § 1 conspiracy analysis.[33] Likewise, for the reasons stated in note 31, we reverse the judgment on this issue as raised under state law.

V. STATE LAW CONTRACT CLAIMS

The district court held that Fotomat breached several provisions of the franchise agreements, but the significant issues on appeal involve the district court's holding that Fotomat breached an implied covenant of good faith and fair dealing; that Fotomat's multiple breaches of contract constituted "an oppressive, intentional, tortious wrong" requiring punitive damages; and that Fotomat's representations to Photovest since May 1970 concerning the nature and amount of its processor discounts constituted fraud for which punitive damages were appropriate.

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[32]Commentators have not called for the expansion of the intra-enterprise conspiracy doctrine. One respected commentator has referred to the doctrine as "one of the weirdest concepts ever to rear its head in antitrust jurisprudence." Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 Yale L.J. 92, 119 (1966).

[33]Since we have decided that Fotomat and Labs were not two economic entities for § 1 purposes, we need not reach the issue of whether their conduct was sufficient to establish an agreement or conspiracy. However, we note that the evidence in this regard is very thin.

A. *Implied Covenant of Good Faith*

Applying California law, the district court concluded that Fotomat breached an implied covenant of good faith and fair dealing by:

> (a) its saturation of the Marion County market with company-owned stores, including the placement of numerous company stores in the market areas of franchised stores as found; (b) its refusal to relocate losing plaintiff's stores and its imposition of onerous terms upon relocations; (c) its reduction in services to plaintiff, and its efforts to transfer expenses to the franchisees as found; (d) its efforts to prevent plaintiff from changing print processors and thereby obtain better processing at lower cost as found; (e) forcing plaintiff to bring this action to obtain rights it clearly has as found; and (f) its efforts through all of the above to destroy plaintiff's business and to recover the franchise for itself as found.

The covenant of good faith and fair dealing, according to the district court, is implied by California law in every contract and imposes a duty on each party to do nothing to destroy the right of the other party to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose. Under the district court's interpretation of California law, the implied covenant prohibited actions by Fotomat that would preclude profitable operation of the franchise or coerce franchise owners to terminate their agreements on terms favorable to Fotomat. Fotomat argues that the covenant of good faith doctrine is essentially a rationalization for imposing otherwise unfamiliar duties on insurers, and that

in a non-insurance context, the doctrine must be applied only in very narrow circumstances not present here. It is quite clear that California courts have not restricted the doctrine to insurance cases. *See, e.g., Schoolcraft v. Ross,* 81 Cal. App. 3d 75, 146 Cal. Rptr. 57, 59 (1978) (deed of trust); *Osborne v. Cal-Am Financial Corp.,* 80 Cal. App. 3d 259, 145 Cal. Rptr. 584, 589 (1978) (real estate contract); *Ohashi v. Verit Industries,* 536 F.2d 849, 853 (9th Cir. 1976), *cert. denied,* 429 U.S. 1004 (stock transfer agreement). Indeed, the doctrine has been applied to franchise agreements. *Dayton Time Lock Service, Inc. v. Silent Watchman Corp.,* 52 Cal. App. 3d 1, 124 Cal. Rptr. 678, 683 (1975). Thus, Fotomat's suggestion as to the limited scope of application of the doctrine is not persuasive.

As to its suggestion that in a non-insurance context, the doctrine must be applied only in very narrow circumstances not present here, it cites *Hinckley v. Bechtel Corp.,* 41 Cal. App. 3d 206, 116 Cal. Rptr. 33 (Cal. App. 1974), as its only authority. In that case, an employee of the defendant was covered by a group life insurance program under which he had a right to convert it into an individual policy without evidence of insurability within thirty days after termination of employment. He failed to exercise that option after he retired, and when he died over a year later, his administratrix sued the defendant for breach of employment contract for the value of the group life policy. Because the language of the policy clearly prohibited recovery, the court explored but rejected the possibility of implying a term or covenant in the employment contract to allow recovery. It would have had to imply a term which would have required the employer

to give special notice to its employees of the conversion right under the policy. In refusing to imply such a term the court stated that "it must be especially emphasized that appellant does not allege that it was clearly within the contemplation of the parties that Bechtel [employer] should give special notice to its employees of the conversion right. . . ." 116 Cal. Rptr. at 36.

In contrast, in the present case, Photovest argued specifically that Fotomat's actions violated representations it made that were clearly within the contemplation of the parties. Moreover, Fotomat's reliance on *Bechtel* is unpersuasive because *Bechtel* addressed a request to imply a specific provision rather than a general covenant of good faith and fair dealing which is what the district court in the present case did.

Although we affirm generally the district court's holding regarding the breach of covenant of good faith and fair dealing, we disagree with one aspect of that holding. One of the means by which Fotomat was held to have breached that covenant was by "forcing plaintiff to bring this action to obtain rights it clearly has. . . ." In other words, Fotomat's refusal to settle and its concomitant decision to defend in this litigation contributed to Fotomat's breach of the covenant. Photovest has not provided nor have we found any authority to support the district court in this regard. The only cases offered in support by Photovest are cases which involve antitrust or other injury resulting from instituting a pattern of baseless litigation. Nothing in the case law suggests that liability may stem from the *defense* of a lawsuit or from the decision to defend rather than settle. Such a rule would infringe basic rights in our system of jurisprudence.

> Under our jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent.

Ritter v. Ritter, 381 Ill. 549, 46 N.E.2d 41, 44 (1943). We, therefore, reverse the district court's award of $24,089 damages for litigation expenses as part of its damage award for breach of implied covenant of good faith and fair dealing.[34]

Fotomat has also argued, albeit briefly, that the record does not support the findings on which the district court based its conclusion that Fotomat breached an implied covenant of good faith and fair dealing. We have reviewed the record in this regard and must flatly disagree.

B. *Tortious Breach of Contract*

The district court held that Fotomat's "multiple breaches of its contract with Photovest constitute under Indiana law an oppressive, intentional, tortious wrong for which punitive damages are appropriate.[35] The

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[34]For the same reasons we reverse the litigation expenses damage component awarded under other counts.

[35]Although this statement might be interpreted to mean that the tort liability arose from the numerosity of breaches rather than from the substance of the breaches, it is clear from the context and from the allegations in the count which the court was addressing that the number of breaches alone was not the basis for the tort liability.

court would reach the same conclusion under California law."[36] It also concluded that the awarding of punitive damages was in the public interest.

Fotomat argues that neither Indiana nor California law recognizes tort liability for oppressive breach of contract. The seminal case in Indiana is *Vernon Fire & Casualty Insurance Co. v. Sharp,* 264 Ind. 599, 349 N.E.2d 173 (1976). In that case the Indiana Supreme Court, after first acknowledging the general rule that punitive damages are not appropriate for breach of contract, discussed exceptions to that rule. It explained that punitive damages may be awarded if the conduct of the breaching party "not only amounts to a breach of the contract, but also *independently* establishes the elements of a common-law tort such as fraud." *Id.* at 180. It also explained that punitive damages could be awarded in the absence of an independent tort if "it appears from the evidence as a whole that a serious wrong, tortious in nature, has been committed, but the wrong does not conveniently fit the confines of a pre-determined tort . . . [and] *that the public interest will be served by the deterrent effect punitive damages will have upon future conduct of the wrongdoer and parties similarly situated.*" *Id.* (emphasis in original).

It is, therefore, clear under Indiana law that in the proper circumstances punitive damages may be awarded on a tort theory in a breach of contract case. Although Fotomat has contested the propriety of mixing tort liability into a breach of contract set-

[36]Although the court and the parties agreed that California law applied for contract breach purposes, the court apparently applied Indiana law regarding tortious breach of contract because the tort occurred in Indiana. The parties have not contested this.

ting, a practice which we ourselves view as questionable, we are compelled to follow the state law as articulated by the Indiana Supreme Court in *Vernon Fire & Casualty Insurance Co.* In doing so, we note that Fotomat has offered no persuasive reasons why its conduct did not satisfy the requirements set forth in that case. Thus, we affirm the district court's decision that punitive damages are *appropriate.*[37]

We cannot, however, affirm the district court's award of an equal amount of actual damages for tortious breach of contract.[38] *Vernon Fire & Casualty Insurance Co.* does not permit the tortious breach of contract theory to be used as a means to recover actual damages. It very clearly articulated this theory as a justification only for awarding punitive damages. *See Hibschman Pontiac, Inc. v. Batchelor,* 266 Ind. 310, 362 N.E.2d 845, 847 (Ind. 1977). We, therefore, reverse the district court's award of *actual* damages for tortious breach of contract.[39]

[37]Although the district court held that punitive damages were appropriate, it concluded that: "Because the court holds that defendant has violated Indiana Code 24-1-2-1 and 24-1-2-2, which are Indiana criminal statutes, plaintiff may not under Indiana law recover the punitive damages to which it would otherwise be entitled for activity by defendant which violates those criminal statutes."

Because the conduct which supported the punitive damages was in essence the same conduct which contributed to the antitrust treble damage liability, it would be inappropriate under Indiana law to award punitive damages in addition to the punitive aspects of the treble damage award. *See Taber v. Hutson,* 5 Ind. 322, 325 (1854); *Glissman v. Rutt,* 372 N.E.2d 1188, 1190 (Ind. App. 1978).

[38]The district court stated that Fotomat's tortious breaches of contract constituted a basis for actual damages of $894,046.76 and for an equal amount of punitive damages.

[39]To eliminate any confusion, our holding does not disturb the district court's award of compensatory damages for normal, as distinct from tortious, breaches of contract regarding film markups, processing discounts, etc.

C. *Fraud*

The district court held that Fotomat's representations to Photovest since May 1970 concerning the nature and amount of its processor discounts constituted fraud under both Indiana and California law. The elements of actionable fraud are: (1) false representation of material fact; (2) knowledge of falsity or lack of reasonable ground for believing the matter asserted to be true; (3) intent to induce reliance thereon; (4) justifiable reliance by the plaintiff; and (5) resulting damage. *Auto Owners (Mutual) Insurance Co. v. Stanley,* 262 F.Supp. 1, 4 (N.D. Ind. 1967); *Vasquez v. Superior Court,* 94 Cal.Rptr. 796, 484 P.2d 964, 970 (Cal. 1971). Fotomat's only significant argument is that Photovest did not satisfy the fourth element because its reliance on Fotomat's misrepresentations were not justifiable. It argues that the record proves that Photovest had knowledge of the fraud since March 1970 and thus it could not have justifiably relied on the misrepresentations. Our review of the record, however, indicates that the few amorphous bits of information that Photovest may have been aware of were insufficient to provide grounds for it reasonably to be able to construct even a rough idea of the full scope and substance of the fraud.[40] Accordingly, its reliance on Fotomat's fraudulent misrepresentations were justifiable. We, therefore, affirm the district court's decision regarding fraud.

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[40]We do not suggest that a plaintiff with knowledge of the fraud may nevertheless claim justifiable reliance just because it does not know the exact dollar amount involved or every intricate detail of the fraud. But that is not the case here.

VI. DAMAGES

Calculation of Photovest's damages in this case was a very complicated task for the district court, because the case involved several different legal theories with overlapping damages and variations in the statutory periods of limitation. Our disposition of the numerous issues in this appeal has included reversals of some aspects of the district court's decision. On remand, this will require the district court to recalculate damages, but the total damages awarded will not be drastically altered because the bulk of the damages awarded for attempt to monopolize have been affirmed; and damages awarded under theories that have now been reversed were for the most part duplicated in the attempt to monopolize award.

We direct the district court on remand to reassess and recalculate damages consistent with this opinion and, for greater clarity, to list the damage awards under the various counts and indicate what portion of each is duplicative of damages under another count so that the total damages may be computed by adding the nonduplicative amount of each count. We do not suggest that this procedure is required in all similar cases, but when a complex damage award, as in this case, is involved, this procedure will facilitate any subsequent review that may occur. We also do not suggest that the district court did not provide an adequate basis for the damage award. *See Allen v. W.H.O. Alfalfa Milling Co.*, 272 F.2d 98, 100 (10th Cir. 1959). The district court entered damage findings as to each count and made subsidiary findings stating

the amount of the components of each award. Moreover, Fotomat's contention that the damage findings are replete with internal conflicts has not been persuasively supported.

VII. FACT FINDINGS

Fotomat argues that the district court's findings were adopted almost verbatim from findings submitted by Photovest, and thus that we should scrutinize those findings more critically. This court has criticized the practice of adopting the prevailing party's findings without change and has admonished the district courts to "exercise an astucious editorial pen on counsel-submitted findings." *FS Services, Inc. v. Custom Farm Services, Inc.*, 471 F.2d 671, 676 (7th Cir. 1972). We are of the opinion that findings which have been adopted wholesale from those submitted by the prevailing party should be examined more critically to determine whether they are clearly erroneous.

The present case is not an egregious example of undeviating adoption of the prevailing party's findings. The district court rejected all or most of 86 of Photovest's numerous proposed findings, reorganized findings it did accept, and edited others of them. Because it did adopt with little change the bulk of Photovest's findings, however, we have critically reviewed the contested findings and examined the record to insure that it contained the requisite support. As a result, we conclude that except where we have stated otherwise, the findings are not clearly erroneous.

For the reasons stated throughout this opinion, the judgment of the district court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. As we have noted, despite

some reversals, the total damages awarded will not be drastically altered. Accordingly, costs in the judgment of this court will be assessed against the defendant.[41]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[41]Pursuant to Circuit Rule 16(e), that part of the foregoing opinion captioned "I. EXCHANGE OF BRIEFS PROCEDURE" has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question presented by the direction that any district court of this circuit now following the practice of delayed exchange of trial briefs should require in all future cases each party to serve his trial brief on all other parties at some reasonably short time before or after he files the brief with the court or provides a copy to the judge.

APPENDIX B.

Opinion of the United States District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PHOTOVEST CORPORATION

v.

FOTOMAT CORPORATION

No. IP 74-705-C

May 18, 1977

The trial of this action commenced on December 6, 1976 and continued for nine (9) trial days through December 16, 1976 when the case was adjourned. Trial resumed on February 14, 1977 and continued for twenty-two (22) trial days through March 15, 1977. Post trial briefs were scheduled and the parties waived final argument.

Evidence was heard upon the issues of the complaint and answer thereto.

The complaint consists of the December 20, 1974 nine (9) count complaint of the plaintiff, as amended by the March 12, 1976 ten (10) count complaint of the plaintiff, as amended by the formal entry of November 8, 1976 for the pre-trial conferences of July 15 and 16, 1976 containing the voluntary and ordered amendments to the complaint. The plaintiff, in addition to the amendments, withdrew Counts VII and VIII of the December 20, 1974 complaint as amended. Supplementary complaints were filed on December 6, 1976, February 24, 1977 and March 23, 1977.

The answer consists of the April 15, 1976 answer to the March 12, 1976 amended complaint which answer as amended by the formal entry of November 8, 1976 for the pre-trial conferences of July 15 and 16, 1976 containing the voluntary and ordered amendments to the answer and as amended by the September 20, 1976 amended answer to the amended complaint.

Fotomat Corporation filed a counterclaim in four (4) counts. Count I sought a declaratory judgment to interpret a contractual provision of selling film and processing at Fotomat's "cost without any markup whatsoever". Counts II, III and IV sought damages under differing theories, all of which were grounded on Photovest's alleged breach of a contracted choice of forum for litigation provision. There was but one prayer for relief for the combined four (4) counts. Count I of the counterclaim was voluntarily withdrawn in the pre-trial conference of July 15 and 16, 1976 subject to reinstatement in the event plaintiff withdrew from its complaint the issues of Count I of the counterclaim. Counts II, III and IV of the counterclaim were thereafter summarily adjudicated against Fotomat on September 27, 1976. After the close of plaintiff's case in chief, Fotomat orally advised the Court it intended to prove its attorney fees in post trial proceedings. On March 11, 1977 Fotomat tendered its pleading entitled Supplemental Counterclaim by Defendant Fotomat for Declaratory Judgment Pursuant to Title 28 U.S.C. Section 2201. Fotomat orally requested authority to file such supplemental counterclaim. Fotomat alleged the Court has ancillary jurisdiction over the supplemental counterclaim for declaratory relief because it arose out of the same transactions and occurrences

that are the subject of the lawsuit. The supplemental counterclaim is based upon certain provisions of an August 26, 1968 Master Franchise Purchase Agreement between the parties. Photovest claims that paragraph four (4) of such agreement conferred upon it the exclusive rights to any additional stores constructed by Fotomat in the geographic territory of Marion County, Indiana, and the right of first refusal to purchase stores opened and operated by Fotomat and not offered for sale by Fotomat; that because of such Photovest's claim, for which it claims damages and other relief, an actual controversy exists; that Fotomat has expended time, effort and attorney fees in defense of such Photovest's claim; and Fotomat requested certain declaratory relief and reimbursement for the attorney fees incurred as allegedly authorized by paragraph seven (7) of such agreement. The March 11, 1977 oral motion was amended on March 15, 1977, at the suggestion of the Court, for permission to file, in lieu of the tendered supplemental counterclaim, an amendment to the counterclaim by adding a Count V to the counterclaim pursuant to Federal Rules of Civil Procedure 15(b). The oral motion to amend was reduced to writing and filed on March 21, 1977 and Count V of the amended counterclaim was tendered with such motion. Count V of the amended counterclaim is the same as such tendered supplemental counterclaim. Count V of the amended complaint sounds in contract and alleges certain alleged breaches of contract, including an alleged breach by Fotomat of paragraph four (4) of such Master Franchise Purchase Agreement on page nineteen (19) as paragraph forty-nine (49) of the amended complaint. Count IX of the amended complaint sounds in tort and alleges Fotomat was guilty

of bad faith interference with and administration of certain contractual rights, including Photovest's right under paragraph four (4) of such Master Franchise Purchase Agreement on page twenty-eight (28) as paragraph eighty-three (83) of the amended complaint. Count X of the amended complaint sounds in tort and alleged Fotomat was guilty of violating the Indiana Offenses Against Property Act involving certain contract rights, including Photovest's rights under paragraph four (4) of such Master Franchise Purchase Agreement on page thirty (30) as paragraph eighty-six (86) of the complaint. The motion was granted on March 28, 1977. On April 12, 1977 a three defense reply was filed.

Count I of the amended complaint, as supplemented, sounds in tort. Count I proceeds upon alleged claims of violations of Section 1 of the Sherman Act (Title 15 U.S.C. Section 1) and Section 3 of the Clayton Act (Title 15 U.S.C. Section 14). Plaintiff requests threefold its alleged damages and attorney fees under Title 15 U.S.C. Section 15 and a perpetual injunction restraining defendant from continuing such claimed violations. This Count was predicated upon the theory that defendant restrained and/or attempted to restrain plaintiff's photoprocessing and by engaging in a scheme to drive plaintiff out of business.

Count II of the amended complaint, as supplemented, sounds in tort. Count II proceeds upon alleged claims of violations of Section 2 of the Sherman Act (Title 15 U.S.C. Section 2). Plaintiff requests threefold its alleged damages and attorney fees under Title 15 U.S.C. Section 15 and a perpetual injunction restraining defendant from continuing such claimed violations. This Count was predicated upon the theory that defendant

attempted to monopolize the retail drive-through photo-processing business in Marion County, State of Indiana.

Alleged violations of Indiana Antitrust Laws alleged in Counts III and IV correspond to Sections 1 and 2 of the Sherman Antitrust Act referred to in Counts I and II.

Count III of the amended complaint, as supplemented, sounds in tort. Count III proceeds upon alleged claims of restraints of trade in the State of Indiana being alleged violations of the laws of Indiana, Indiana Code of 1971, 24-1-2-1. Plaintiff requests threefold its damages and attorney fees under Indiana Code of 1971, 24-1-2-7 and a perpetual injunction restraining defendant from continuing such claimed violations.

Count IV of the amended complaint, as supplemented, sounds in tort. Count IV proceeds upon alleged claims of attempt to monopolize or conspire to monopolize trade or commerce in the State of Indiana being alleged violations of the laws of Indiana, Indiana Code of 1971, 24-1-2-2. Plaintiff requests threefold its damages and attorney fees under Indiana Code of 1971, 24-1-2-7 and a perpetual injunction restraining defendant from continuing such claimed violations.

Count V of the amended complaint, as supplemented, sounds in contract. Count V proceeds upon alleged claims of breaches of certain provisions of the standard franchise agreements. Plaintiff requests compensatory damages; interest; attorney fees as provided in the agreement between the parties; for an accounting at defendant's expense of all amounts allegedly improperly received or retained by defendant and for restoration of said amounts; and for an injunction against defendant's alleged retention of further discounts or kickbacks, against defendant's alleged collection of royalties and

fees as to items sold below plaintiff's cost, against defendant's further operation of existing company owned stores in Marion County, Indiana, against installation of stores in Marion County, Indiana, by defendant without prior compliance with the franchise agreement, and against defendant's further withholding of services required by the franchise agreement of defendant.

Count VI of the amended complaint, as supplemented, sounds in tort. Count VI proceeds upon alleged claims of fraud and deceit. Plaintiff requests compensatory damages; interest; for punitive damages; for an accounting at defendant's expense of all amounts allegedly improperly received or retained by defendant and for restoration of said amounts.

Count IX of the amended complaint, as supplemented, sounds in tort. Count IX proceeds upon alleged claims of bad faith, interference with contractual rights and bad faith administration of contract. Plaintiff requests compensatory damages; interest; punitive damages; for an accounting at defendant's expense of all amounts allegedly improperly received or retained by defendant and for restoration of said amounts.

Count X of the amended complaint, as supplemented, sounds in tort. Count X proceeds upon alleged claims of violations of the Indiana Offenses Against Property Act, Indiana Code of 1971, 35-17-5-4. Plaintiff requests defendant render an accounting at defendant's expense of all alleged discounts, kickbacks and rebates allegedly received by defendant as a result of goods or services sold to plaintiff; and plaintiff requests under Indiana Code of 1971, 35-17-5-12(7), compensatory damages for the amount of alleged discounts, rebates and kickbacks allegedly unlawfully withheld by defendant, at-

torney fees, and threefold the amount of such compensatory damages.

The first defenses of answer to Counts I through VI, IX and X of the amended complaint consists of specific admissions and denials therein.

The second defenses of answer to Counts I through VI, IX and X of the amended complaint allege that venue of the action has been improperly placed in the United States District Court for the Southern District of Indiana but is in the United States District Court for the Southern District of California for the reason, it is alleged, that there is a valid and enforceable forum selection clause in the contracts requiring that any action arising out of the contracts must be brought in the latter district.

The third defenses of answer to Counts I and II of the amended complaint allege that the plaintiff knew at least as early as March of 1970 that the defendant was not passing on to plaintiff the benefit of certain discounts that defendant was receiving on film sold to plaintiff by defendant and of certain discounts on film processing sold to plaintiff and plaintiff first commenced an action on December 20, 1974. Defendant contends that Title 15 U.S.C. Section 15b bars such claims and damages which accrued prior to December 20, 1970.

The third defenses of answer to Counts III and IV of the amended complaint allege that the plaintiff knew at least as early as March of 1970 that the defendant was not passing on to plaintiff the benefit of certain discounts that the defendant was receiving on film sold to plaintiff by defendant and film processing sold to plaintiff and plaintiff first commenced an

action on December 20, 1974. Defendant contends that Section 34-1-2-2 of the Indiana Code of 1971 (hereinafter referred to as IC) bars such claims or damages which accrued prior to December 20, 1972 under Indiana's restraint of trade statutes IC 24-1-2-1 and IC 24-1-2-2.

The third defense of answer to Count V of the amended complaint alleges that all claims that accrued to plaintiff prior to August 22, 1974 are barred by reason of the provisions of paragraph F-11.16 of each of the sixteen (16) written contracts between plaintiff and defendant which in substance require that any claim of the plaintiff that arises by reason of each of such contracts must be filed on or before one hundred twenty (120) days from the date of the creation of such claim. And/or the defendant further asserts that if such contracted limitation is not applicable, then California Code of Civil Procedure Section 337 (West, 1976 Supp.) bars such claims or damages which accrued prior to December 20, 1970.

The third defense of answer to Count VI of the amended complaint alleges that all claims that accrued to plaintiff prior to August 22, 1974 are barred by reason of the provisions of paragraph F-11.16 of each of the sixteen (16) written contracts between plaintiff and defendant which in substance require that any claim of the plaintiff that arises by reason of each of such contracts must be filed on or before one hundred twenty (120) days from the date of the creation of such claim. And/or the defendant asserts that if such contracted limitation is not applicable, then California Code of Civil Procedure Section 338(4) (West, 1976 Supp.) bars such claims or damages which accrued prior to December 20, 1971.

The third defense of answer to Count IX of the amended complaint alleges that all claims that accrued to plaintiff prior to August 22, 1974 are barred by reason of the provisions of paragraph F-11.16 of each of the sixteen (16) written contracts between plaintiff and defendant which in substance require that any claim of the plaintiff that arises by reason of each of such contracts must be filed on or before one hundred twenty (120) days from the date of the creation of such claim. And/or the defendant asserts that if such contracted limitation is not applicable, then California Code of Civil Procedure Section 339(1) (West, 1976 Supp.) bars such claims or damages which accrued prior to December 20, 1972.

The third defense of answer to Count X of the amended complaint alleges that all claims and damages occurring prior to July 26, 1973 are not based upon any wrong or duty as the claims and damages in Count X are based upon Indiana Offenses Against Property Act IC 34-1-2-2 which was made a civil right of action IC 34-1-2-2 on July 26, 1973.

The fourth defenses of answer to Counts I and III of the amended complaint in partial defense thereto allege that in order to preserve and protect defendant's valuable trademark and service mark rights the defendant must maintain a standard of quality that the public has come to expect in defendant's brand of products and services. Defendant asserts that it maintains that standard of quality by reserving the right to approve in writing any goods and services sold through the franchising merchandising islands operated by plaintiff.

The fourth defenses of answer to Counts V, VI, IX and X of the amended complaint allege that plaintiff

knew at least as early as March 1970 that defendant was not passing on to plaintiff the benefit of certain discounts defendant was receiving on film and film processing. Despite this knowledge, until shortly before commencement of the instant litigation, it is alleged, plaintiff failed to provide defendant with adequate notice that plaintiff considered such conduct as wrongful, a breach of the agreements, and the basis of a legal claim against defendant. In 1970 and 1972, it is alleged, plaintiff made inquiries of defendant's personnel about the propriety of such discounts being proper. Plaintiff's inquiries were followed by inaction which, it is alleged, led defendant to believe that plaintiff had accepted defendant's position that defendant was entitled to retain such discounts. Defendant further alleges that the knowing failure of plaintiff to timely press its claim against defendant has caused defendant to rely on such inaction to defendant's detriment. Had plaintiff asserted several years earlier the legal claims plaintiff believed itself to have, it is alleged, any disputes between the plaintiff and defendant concerning the interpretation of paragraph F-9.1 of the franchise agreements could have been resolved at an early date. The plaintiff's several years delay in the filing of this action has severely prejudiced defendant because it has allowed the accrual of substantial damages which defendant may become obligated to pay should plaintiff's interpretation of paragraph F-9.1 of such contracts be adjudged as the correct and proper one. Plaintiff's delay has had the effect of enhancing the damages which plaintiff may recover in this action. Plaintiff, it is alleged, should not be allowed to increase plaintiff's damages. The defendant asserts that the plaintiff notified or acquiesced in defendant's alleged error complained of in each of Counts V, VI, IX and X within the meaning of

California Code of Civil Procedure Section 3516 (West 1970); and/or the defendant asserts that the plaintiff has waived its right to the claims complained of in each of Counts V, VI, IX and X within the meaning of California Code of Civil Procedure Section 1501 (West 1954) and California Code of Civil Procedure Section 2076 (West 1955) and other authorities; and/or the defendant asserts that the plaintiff should be estopped from making the claims complained of in each of Counts V, VI, IX and X.

The fifth defenses of answer to Counts V and VI of the amended complaint allege that the claim is partially barred in that the equitable claim is barred by reason of the laches of plaintiff in plaintiff's failure to timely seek relief or to commence this action.

The sixth defense of answer to Count V of the amended complaint alleges that such claim is partially satisfied by reason of the accord and satisfaction between plaintiff and defendant as evidenced in particular by a letter agreement of January 26, 1973 between plaintiff and defendant in accord and satisfaction of any claims for breach of contract which plaintiff may have had which arose from the purchase of merchandise and processing services by plaintiff from defendant before December 31, 1971.

The Court has weighed the evidence, the credibility of the evidence and of the witnesses and being informed by the parties' briefs does now publish its findings of facts, conclusions of law and renders its judgment thereon.

The plaintiffs, Photovest Corporation, is an Indiana corporation with its principal place of business in Indianapolis, Indiana. The plaintiff is engaged in the

business of operating sixteen (16) drive-through photographic processing and equipment stores in Marion and Johnson Counties, Indiana, as franchisee of the defendant. The defendant, Fotomat Corporation, is a Delaware corporation with its principal place of business in LaJolla, California. The defendant operates throughout the United States of America as an owner or franchisor of drive-through photographic processing and equipment stores with net revenues as of January 31, 1976 in excess of ten million dollars ($10,000,000.00). The defendant is licensed to do business, transacts business, has an agent, and was found in the geographical jurisdiction of the United States District Court for the Southern District of Indiana. The alleged unlawful activities of defendant were and are alleged to have been carried out in substantial part within such district.

In 1966 the merchandising idea of a drive-through photographic processing and equipment store was conceived by one Charlie Brown. His was apparently the first of the concept of a drive up hut located in a convenient site to serve as a retail outlet for developing pictures for the amateur photographer. The defendant was organized in January 1967 by one Clifford Graham who acquired the rights to the concept and who, with others, undertook to develop it nationally through a franchise system, as well as through company-owned stores. The defendant and its franchisees have since engaged in the business of retailing photographic equipment, supplies and photoprocessing to the public from small free-standing "drive-thru" stores or kiosks, generally located in shopping center parking lots. The kiosk is typically staffed by only one person, known as a "Fotomate." The bulk of the business is sales

of undeveloped film and providing film developing services for snapshots, slides and movies by the amateur photographer. A kiosk owned by defendant is indistinguishable from a franchised kiosk from the customers' point of view. Customers may conveniently transact business at a kiosk store without leaving their automobiles. The undeveloped film is picked up and developed pictures are delivered daily by a station wagon or truck which makes a circuit of the kiosks in a given area. It delivers undeveloped film to a central point for transport to the processing plant. The same vehicle returns developed pictures to the kiosk. Defendant operates its own stores and services its franchisees through nine (9) "regional offices" in the United States and one (1) regional office in Canada. The regions are subdivided into eighty-seven (87) operating areas, each supervised by an area manager. The "Indianapolis area" is one such operating area. An operating area consists of a number of stores located in sufficiently close proximity to each other to permit frequent and efficient pickup and delivery of processing work. Defendant maintains a fleet of vehicles to service its stores. Most areas consist of metropolitan areas of medium or large cities, although a few cities such as Los Angeles are divided into more than one (1) area. In order to be efficiently operated, it is necessary that an area office support a number of kiosks within a sufficient proximity that the truck or station wagon and area management can conveniently reach the kiosks daily. In 1968 defendant was the only retailer of photographic processing services and equipment on a national basis utilizing the drive-thru merchandising concept, and was the only entity offering franchises to operate nationally advertised drive-thru photo-processing units

under a national trademark. It was the only drive-thru franchiser known to Photovest's principals. As of January 31, 1976, the drive-thru photographic industry in the United States consisted of approximately three thousand (3,000) retail stores. Of these two thousand one hundred forty-three (2,143) were operated by defendant, one hundred twenty-four (124) by its franchisees and approximately seven hundred (700) were operated by other entrants. From 1967 continuously until the present, defendant has been by far the dominant entrant in the drive-thru photographic industry nationally and in Indianapolis. The first Fotomat store was opened in 1967. The total number of Fotomat stores in operation in North America and in the Indianapolis area at various times was as follows:

Date	Independent Franchise		Partnership	Company	
	National	Indianapolis	(None in Indianapolis)	National	Indianapolis
12/31/67	11	0	0	8	0
3/31/68	20	0	0	11	0
6/30/68	32	0	0	30	0
9/30/68	102	0	0	64	0
1/31/69	119	4	101	205	0
1/31/70	213	10	161	628	1
1/31/72	300	(combined 15 franchise and partnership)		787	3
1/31/73	110	15	136	950	3
1/31/74	101	15	136	1165	3
1/31/75	99	16	93	1617	8
1/31/76	98	16	26	2143	12
1/31/77		16			14

Defendant did not have the capital or the ability to immediately expand in all markets. Beginning in 1967, defendant sold franchises and entered into franchise and lease agreements with respect to certain stores.

Franchised stores are generally operated by the independent owners pursuant to the franchise and lease agreements. Many franchisees held rights to only one (1) or a few stores. Others, called "block" franchisees, were sold franchise rights to entire metropolitan areas and committed to purchase a large number of stores. In 1968 and 1969, defendant also sold franchises to certain individuals and limited partnerships under agreements whereby Fotomat operated the stores for the franchisee. A limited number of franchises were initially sold for nine thousand eight hundred dollars ($9,800.00) per store. Thereafter the franchise price increased in stages until July, 1968, when the price of twenty-one thousand dollars ($21,000.00) each was established. From the outset defendant had the objective to "blitz the industry," *i.e.*, to preempt the desirable sites for drive-thru kiosks nationally. Franchising was adopted by Fotomat in order to provide capital and operating management for its rapidly expanding operations and to permit simultaneous development of many metropolitan areas. During its initial years of operation, the majority of all defendant's revenue was derived from the sale of franchises, not from operations. Defendant's management initially intended that a substantial proportion of the five thousand (5000) planned stores would be owned and operated by franchisees. By October 10, 1968, defendant had moved its projected mix of company-owned and franchised stores from seventy percent (70%) franchised and thirty percent (30%) company-owned to forty-five percent (45%) franchised and fifty-five percent (55%) company-owned. In January, 1969, defendant filed a preliminary prospectus with the Securities and Exchange Commission with respect to a proposed sale to the public

of four hundred eighty-seven thousand five hundred (487,500) shares of common stock. The prospectus noted that substantially all income earned by defendant through December 31, 1968 had been derived from the sale of franchises. Through December 31, 1968, defendant accounted for eight million ninety-seven thousand one hundred dollars ($8,097,100.00) in revenue from initial franchise fees and an additional three hundred ninety-five thousand nine hundred thirty dollars ($395,930.00) in rents and monthly franchise fees. The prospectus also stated that defendant believed that the sale of franchises will continue to be an important source of revenue in the immediate future. Franchising was important to the early success of defendant. By approximately June, 1969, the management and directors of defendant had concluded that the profitability to defendant of company-owned stores was significantly greater than the profitability of franchised stores. At about the same time, defendant resolved to reduce its sales of franchises to the lowest possible level consistent with the immediate financial needs of the company. After 1969 no significant franchise sales were made except to fulfill commitments to "block" franchisees who had rights to purchase additional stores. Some franchises were reacquired. In January, 1971, Clifford Graham, the founder of defendant, was replaced as President by another, who had been a director since 1968, but had not otherwise been engaged in management until 1970. Shortly thereafter, a new franchise relations director was employed with instructions to "work himself out of a job." Defendant renewed its attempt to repurchase its franchises, an effort that continues to this day. Beginning in May, 1968, defendant's franchise agreements generally contained a provi-

sion whereby defendant was entitled after three (3) years to repurchase the franchise at a price equal to the greater of fifty thousand dollars ($50,000.00) or five (5) (or in some cases six and one-half (6½)) times earnings during the previous twelve (12) month period. Defendant's repurchase efforts have been directed to repurchasing at prices from twenty-one thousand dollars ($21,000.00) to thirty thousand dollars ($30,000.00) per store. The highest price ever paid was forty thousand dollars ($40,000.00). In fact, defendant's management originally had no intention of ever repurchasing its franchises at any price. On February 12, 1969, Eastman Kodak Co. brought suit against defendant in the United States District Court for the Northern District of Georgia alleging unfair competition and infringement of trademarks and trade dress and requesting injunctive relief. The suit by Kodak had a severe adverse effect upon defendant's ability to sell franchises. Subsequently Kodak announced it would not sell film to defendant. Because Kodak film was the industry leader at that time, there was concern within defendant's management that the company could survive. On April 15, 1970, defendant had instituted a separate action against Eastman Kodak in the United States District Court for the Northern District of California. The suit sought damages from Kodak in the amount of three hundred twenty-one million six hundred thousand dollars ($321,600,000.00), as well as divestiture and other remedies as a result of alleged monopolization and other antitrust violations by Kodak. Both this suit and the trade dress suit by Kodak against defendant were settled on December 17, 1971. Among the items claimed as damages by defendant were lost royalties from its franchisees. As a result of the Kodak

settlements, defendant was required to make certain changes in the design of its stores, a portion of which changes were financed by Kodak. More importantly, Kodak both paid cash to defendant and agreed to extend credit to defendant in significant amounts. The Kodak settlement amounted to a benefit of approximately five million dollars ($5,000,000.00) to defendant and eliminated a substantial drain upon defendant in attorney fees and management time. It also provided defendant with much needed capital and credit. It represented a significant breakthrough for defendant. Beginning in 1972 and continuing to date, defendant renewed its efforts to expand in most major metropolitan areas. Its stated goal was to preempt desirable locations and thereby dominate the drive-thru business. By 1974 defendant's President claimed, correctly, that "We have the business to ourselves except for a few small companies and we intend to keep it that way." He further stated, correctly, that it was defendant's intent "not to leave anough profit for others to feed on what we leave." Its recent move of certain corporate officers to Connecticut is in part designed to facilitate its efforts to complete its saturation of eastern United States markets before others acquire a toehold. Sometime after 1971, defendant determined that from its point of view a sales level of between sixty thousand dollars ($60,000.00) and eighty thousand dollars ($80,000.00) per store is "optimum." This "optimum" sales level applies equally to company stores and franchised stores. It now overlaps existing stores, company and franchised, that attain sales levels in the higher seventy thousand dollars ($70,000.00) or better level. Some stores, if not overlapped, attain much higher levels, and in areas where there is no significant drive-thru competition

or overlapping, an average defendant store may attain sales of over one hundred thousand dollars ($100,-000.00). Conversely, in areas of intense drive-thru competition, or as in Indianapolis, where there has been a high incidence of overlapping of markets by defendant itself, the average defendant store does much worse than the "optimum" level. Defendant, in the past few years, has adopted a deliberate policy of opening new overlap stores in the marketing area of company owned and franchised stores in Indianapolis. As a result, sales growth beyond seventy thousand dollars ($70,000.00) per store is not anticipated as a general proposition and mature stores substantially above that level were and are expected to decline. Defendant's actions are by design in that defendant expects to profit from this by increased sales in new stores. It was the expectation of satisfactory sales of ninety thousand dollars ($90,000.00) and the hope of much higher sales levels that formed the basis of defendant's sales of franchises in 1968 to plaintiff. Beginning in 1974 in Indianapolis, defendant has systematically set about attempting to prevent its stores and those of plaintiff from remaining at levels significantly above seventy thousand dollars ($70,000.00). This is accomplished by deliberately installing a new store in markets already served at least partially by an existing store. In plaintiff's case, its most successful stores have all been overlapped and, as a result, have suffered declines in sales volumes from approximately ninety thousand dollars ($90,-000.00) in 1974 to much lower levels in early 1977.

Until 1972, the defendant used independent processors. In 1972, defendant entered into a joint venture and processed film. Later Fotomat Labs, a separate corporation and a wholly owned subsidiary of defendant,

is its principal processor. Fotomat Labs, Inc. has been quite profitable. It was for some time defendant's goal to place all of defendant's print processing with Fotomat Labs and that has now been substantially accomplished. Defendant engaged in actions to deter franchisees from using independent processors, that were designed, among other things, to keep the franchisee's business for Fotomat Labs, Inc. These actions were by agreement among the President of Fotomat Labs, Inc. and the President of defendant, and others.

In July of 1968, defendant placed an advertisement in the Midwest edition of the Wall Street Journal soliciting the sale of franchises in several states, including Indiana. The advertisement stated that defendant was "one of the fastest-growing franchise systems in the nation," and that "only a few key franchise areas are still available." The advertisement indicated that two (2) states, California and Arizona, were already "sold out." Three (3) young Indiana residents responded to the advertisements. On August 26, 1968, they entered into an agreement with defendant whereby plaintiff, as their assignee, acquired the franchise rights to fifteen (15) stores in an area defined as Marion County, Indiana, plus the Greenwood Shopping Center in Johnson County, Indiana. A copy of the commitment contract, identified as PX 443, is attached hereto and is made a part hereof. The contract developed Marion County, Indiana, for the mutual benefit of plaintiff and defendant. Plaintiff agreed to purchase fifteen (15) stores at a cost of twenty-one thousand dollars ($21,000.00) per store for a total of three hundred fifteen thousand dollars ($315,000.00). The franchise price was payment for the right to use the defendant's trademark name of "Fotomat," also a small

amount of equipment, original inventory and miscellaneous items of a value of less than one thousand dollars ($1,000.00). Plaintiff agreed to pay defendant a continuing advertising fee in the amount of three percent (3%) of each stores sales and a royalty of twelve percent (12%) of each stores sales in excess of two thousand five hundred dollars ($2,500.00) per month. The plaintiff was required, as a condition to the defendant's granting of each of the fifteen (15) franchises for the fifteen (15) stores, to lease the store from defendant at a rent of three hundred seventy-five dollars ($375.00) per month with a cost-of-living escalator effective after five (5) years. A copy of each of the franchise contracts, identified as PX4001F, PX4002F, PX4003F, PX4004F, PX4005F, PX4006F, PX4007F, PX4009F, PX4010F, PX4013F, PX4017F, PX4018F, PX4019F, PX4020F, and PX4023F are attached hereto and made a part hereof. A copy of each of the leases, identified as PX4001L, PX4002L, PX4003L, PX4004L, PX4005L, PX4006L, PX4007L, PX4009L, PX4010L, PX4013L, PX4017L, PX4018L, PX4019L, PX4020L, and PX4023L are attached hereto and made a part hereof. The Indiana investors responded to defendant's advertisement to open the negotiations for the above contracts by making application for the area of Indiana with emphasis on Marion County in which the City of Indianapolis is situated. In July, 1968, certain of such investors made two (2) trips to defendant's headquarters in LaJolla, California. During these trips such investors were given an extensive sales talk by defendant designed to induce their purchase of franchises. The defendant's sales talks were generally the same as to all prospective block franchisees. Among other things, defendant represented

that defendant sold all inventory and film processing to its franchisees "at no markup, no minimums, no delivery cost;" that defendant would provide "buying power," daily pickup and delivery service, use of name, administrative support, training, maintenance of the kiosk, customer service, other "general services," and "complete merchandising support." All of the above were to be in consideration of the initial franchise fee and a royalty of twelve percent (12%) of each kiosk's monthly gross receipts in excess of two thousand five hundred dollars ($2,500.00). Defendant also represented that each store had a "market area" consisting of the geographic area from which the store drew its customers; and that as a general rule no store would be constructed within two (2) miles of any existing store in order not to infringe upon the market area of the existing store. The market area could be determined by a number of factors including residential pattern, traffic pattern and natural barriers (e.g. lakes, mountains and freeways). Defendant represented that it would select sites for the franchisees based upon sophisticated demographic studies which it and others had conducted. It represented that two (2) stores would not overlap each other's market areas because defendant's royalties applied only to receipts of stores in excess of two thousand five hundred dollars ($2,500.00) per month. Defendant told the prospects it could "not afford" to have overlapping in market areas. In the context of negotiations for the entire Indianapolis area, such investors understood this to apply to prevent two (2) franchised stores from drawing from the same area. Defendant also represented that stores were relatively portable and could be easily moved to a new location should sales prove unsatisfac-

tory at the original location and the agreement provided for relocation to any place within ten (10) miles. Any such relocations were to be at defendant's expense. Defendant described a store sales level of sixty thousand dollars ($60,000.00) per year as "modest," ninety thousand dollars ($90,000.00) per year as "satisfactory," one hundred twenty thousand dollars ($120,000.00) per year as "above average," and one hundred fifty thousand dollars ($150,000.00) per year as "high." Defendant at that time estimated that an average store after three (3) years in place or older would have average sales of seven thousand five hundred dollars ($7,500.00) per month or ninety thousand dollars ($90,000.00) annually. Based on these sales levels, defendant's sales literature predicted annual rates of return on initial investment of between twenty-nine percent (29%) for a "modest" store, fifty-six percent (56%) for a "satisfactory" store, and up to one hundred fifty-four percent (154%) on a "high volume" store. Defendant's franchise agreement also required that the franchisee pay defendant three percent (3%) of the franchisees' gross sales as an advertising payment. That money was to be spent for local and national advertising which would benefit the franchisee. "Local" advertising was to include flyers, point-of-sale materials, newspaper ads, and local media ads (T.V. and radio). "National" advertising benefiting the franchisee was to include advertising such as national magazine ads and national cooperative promotions with other large companies. Defendant told such investors that defendant estimated the Marion County area would support fifteen (15) stores. This was based upon defendant's belief that a typical metropolitan area would sustain roughly one (1) store for each fifty thousand

(50,000) to sixty thousand (60,000) population. The population of Marion County, Indiana, in 1968 was approximately seven hundred fifty thousand (750,000) and defendant had identified fifteen (15) as the "saturation level" of Indianapolis. Defendant, in July, 1968, proposed that such investors purchase franchise rights to fifteen (15) stores in Marion County, Indiana. Such investors understood they would also have a first right of refusal on any additional stores sold in Marion County. This appears in the written contract as discussed below. The investors were aware in July, 1968, that defendant operated both company-owned units and franchised units in some parts of the county. However, they were given to understand and believe that Marion County was a "franchise area." The area was to be developed for mutual profit by Fotomat and the franchisee. They knew at the time of the signing of the franchise purchase agreement that company-owned defendant stores could be operated in Marion County, Indiana, if the population substantially increased. They understood that any stores in addition to the fifteen (15) they committed to purchase might be offered to other prospective franchisees, but only in the event they failed to exercise their first right of refusal. Neither defendant nor the investors believed in 1968 that Marion County would support more than the fifteen (15) stores on which the negotiations were based in the foreseeable future. The investors were told by defendant that all fifteen (15) Marion County units would be installed by December 31, 1968. In anticipation of the purchase and operation of their franchises, such investors on July 16, 1968, formed Photovest Corporation. Defendant said nothing to such investors about any plan or practice of defendant to retain

"cash discounts," "advertising allowances," volume discounts, rebates or other amounts received from processors or suppliers with respect to photoprocessing or supplies resold by defendant to plaintiff. Defendant intended, and such investors understood, that defendant would sell photoprocessing and inventory to plaintiff at the same net price which defendant paid to its suppliers. This "buying power" was to be "passed on" to the franchisees and as earlier noted this was one of the selling points used by defendant in its presentation to prospective franchisees. At the time the franchise purchase agreement was entered into, defendant intended and plaintiff understood that support services (other than training) performed by the defendant's area manager, his assistants, route drivers, and other of defendant's personnel (including corporate executives), would be provided to plaintiff without any additional charge beyond the initial franchise fees and the continuing twelve percent (12%) royalty fees. In October, 1968, defendant placed a second advertisement in the Midwest edition of the Wall Street Journal soliciting the sale of franchises in certain midwestern cities. The ad stated that defendant was "one of the fastest growing franchise systems in the nation" and that "only a few key franchise areas are still available." The ad prominently displayed the names of various midwestern cities, including "Indianapolis," with a line drawn through the name and the notation, "sold out."

The first Indianapolis store was opened at McCoy and Pendleton Pike, in Indianapolis, on October 18, 1968. The store was designated IN-1. Two (2) other stores, IN-2 and IN-3, were constructed and turned over to the franchisee in 1968. Upon each opening plaintiff executed copies of the standard franchise agree-

ment and the standard lease agreement, and paid to defendant the twenty-one thousand dollars ($21,000.00) initial franchise fee plus the initial month's rent and security deposit on the store. Shortly after the franchise purchase agreement was signed, investors realized that additional capital was necessary to complete the fifteen (15) store purchase commitment. Another investor was invited to invest in plaintiff. Plaintiff's initial equity of one hundred thousand dollars ($100,000.00) was substantially depleted by the end of 1968 by reason of the initial forty thousand dollars ($40,000.00) franchise deposit and the twenty-one thousand dollars ($21,000.00) initial franchise fees paid to defendant upon the opening of the first three (3) stores. As expected, operating losses were also incurred during this period. In October, 1968, plaintiff obtained a loan commitment in the amount of one hundred thousand dollars ($100,000.00) from a local bank in Indianapolis. Upon the depletion of original equity, plaintiff drew upon this loan as each new store was opened for the initial franchise fees of twenty-one thousand dollars ($21,000.00). The bank required each of the four (4) shareholders and their wives personally to guarantee each of the plaintiff's notes. By June 30, 1969, only seven (7) of plaintiff's stores were in operation. The bank felt insecure over the extended delays beyond the projected schedule of store openings and, on June 26, 1969, the bank notified plaintiff that it would not lend any additional amounts. It demanded that the existing loan be secured or liquidated by July 15, 1969. Plaintiff on August 1, 1969, obtained a commitment from another local bank in Indianapolis to lend plaintiff two hundred thousand dollars ($200,000.00) to be used to repay the first

bank and to finance the initial franchise fees for the remaining plaintiff's stores. To obtain the second bank loan, plaintiff issued two hundred twelve (212) new shares of plaintiff's stock representing ten percent (10%) of the corporation to another investor for five thousand dollars ($5,000.00). In turn, he and his wife guaranteed one hundred thousand dollars ($100,000.00) of the second bank loan and pledged marketable securities to secure their guarantee. The second bank loan was also guaranteed in its entirety by plaintiff's other stockholders and their wives. By November 28, 1969, plaintiff still had received only ten (10) stores out of the promised fifteen (15). Plaintiff's overhead and operating expenses were set up for a fifteen (15) store operation and severe losses were being incurred. In January, 1970, plaintiff's President was replaced as President of plaintiff and the replaced President sold his shares to the new President. Five (5) additional plaintiff's stores were opened in February, March and April, 1970, thereby completing the original fifteen (15) store commitment. The fifteenth (15th) store was opened April 24, 1970, almost twenty (20) months after the agreement was signed and sixteen (16) months after the date originally predicted by defendant. Defendant retained the forty thousand dollars ($40,000.00) deposit paid by plaintiff in August, 1968, without paying interest on the deposit. The deposit was ultimately credited against the franchise fees for the fourteenth (14th) and fifteenth (15th) stores upon their openings in March and April, 1970. In the spring of 1970 plaintiff had a negative net worth. Its shareholders and their wives were personally liable on borrowings in excess of two hundred thousand dollars ($200,000.00). Most of its stores were not yet profitable.

Over the period from mid-1970 through 1973, plaintiff's stores grew and prospered. By the spring of 1974 plaintiff's annual sales were running at a level of approximately one million dollars ($1,000,000.00). The bank debt had been retired and the corporation began to pay accrued salaries to three (3) of the investors, all of whom had served without compensation until the debt was retired in 1973. In the new President's case the efforts directed to plaintiff in this period were many hours per week. In 1973, the new President purchased the ten percent (10%) interest of the last investor for fifty thousand dollars ($50,000.00). Defendant's basic method of operation in Indianapolis remained essentially uniform from 1968 to approximately November, 1974. Defendant established a central "area office" staffed by an "area manager" and assistants. Route drivers employed by defendant drove from the area office to each store in the area (franchised or company-owned), picking up film received by the store and delivering finished film and inventory to the stores. Beginning in April, 1972, the route was run twice daily in order to permit the processor to receive and begin work on a part of each day's business earlier. By June, 1970, Indianapolis stores IN-1, IN-2, IN-3, IN-4, IN-5, IN-6, IN-7, IN-9, IN-10, IN-11, IN-12, IN-13, IN-14, IN-16 and IN-17 had been turned over to plaintiff as franchised stores at the time of opening or shortly thereafter. Fourteen (14) of plaintiff's stores were located in Marion County, and one (1) (IN-12) was located in northern Johnson County in the vicinity of the Greenwood Shopping Center pursuant to a provision in the agreement that treated that center as a part of Marion County for these purposes. At the time plaintiff's fifteenth

(15th) store, IN-17, was installed, defendant was operating two (2) company stores in counties contiguous to Marion County. These company stores were IN-8 and IN-15. Both IN-8 and IN-15 were serviced by defendant out of the Indianapolis area office but were not in Marion County. The first of these, IN-8, was installed in April, 1969, near a competing photographic drive-thru store operating under the trade name "Foto-Fair." IN-8 was designated in defendant's documents as a "company competition unit" or "competitive unit." By July, 1970, according to a defendant memorandum, "the competition [had] * * * been removed leaving the market area to Fotomat." Sales at IN-8 during its first twelve (12) months of operation were twenty thousand four hundred fifty-nine dollars ($20,459.00), the lowest of any of the first seventeen (17) stores built in the Indianapolis area. IN-15, the second company store serviced by the Indianapolis area office, was constructed in Plainfield, Indiana, in adjoining Hendricks County, in March, 1970. The store was offered to plaintiff as a franchised store but was rejected by plaintiff because it was too far from existing stores. It was not in Marion County. After the initial fifteen (15) plaintiff stores were installed, two (2) stores originally operated by plaintiff, IN-12 and IN-16, were taken over and operated by defendant due to poor sales and continuing losses to plaintiff. IN-12 was transferred to defendant on or about June 25, 1970, in exchange for IN-8. IN-16 was transferred to defendant on or about June 8, 1970, and was operated by defendant as a company store until it was closed on October 20, 1970. These actions were pursuant to defendant's early practice of relocating stores in unprofitable locations as it had said it would

in its presentation to franchise prospects. In agreeing to exchange IN-12 for IN-8, plaintiff relied upon the representation by defendant that defendant would close IN-12 after the exchange. IN-12 and IN-8 were located on the same street within three (3) miles of each other and were drawing customers from the same market area. Defendant did not close IN-12 following the exchange, however, and has continued to operate the store as a company store until the present. Besides IN-12 and IN-16, plaintiff also experienced unsatisfactory initial sales levels at stores IN-5, IN-9, IN-10, IN-11 and IN-14, and (after the switch for IN-12) IN-8. Plaintiff requested the relocation or closing of each of these stores at various times during 1970 and 1971. Beginning in early 1970, plaintiff's President began himself to contact shopping center owners in an attempt to obtain for defendant leases upon which plaintiff stores could be located. Prior to that time, all sites had been acquired by defendant's leasing personnel as was defendant's obligation under the franchise agreement. Following the initial contact or contacts, plaintiff's President would arrange for the potential lessor to meet the defendant leasing representative to finalize the lease. Plaintiff's President was informed by defendant's personnel that defendant, not plaintiff, must sign the lease with the shopping center owners. Plaintiff's President played a significant role in the acquisition of leases for two (2) of the final five (5) sites obtained by plaintiff (IN-13 and IN-17). Even after the fifteen (15) store contract was completed, plaintiff's President continued to seek desirable sites for stores in the hope of moving one (1) or more of plaintiff's losing stores to better sites. Through plaintiff's President's efforts, defendant, between Au-

gust, 1970, and June, 1971, obtained leases for three (3) additional store sites in the Indianapolis area. At each site defendant then constructed a new store or physically relocated an existing store, and transferred an existing franchise from one (1) of plaintiff's unprofitable sites to the new location. New store IN-18 was opened in late August, 1970, in exchange for IN-16 (which had been transferred to the defendant in June). New store IN-19 was opened in June, 1971, in exchange for IN-8. New store IN-20 was also opened in June, 1971, in exchange for IN-14. Of the old stores, IN-14 and IN-16 were closed, but IN-8 remained open as a company store. The sites obtained by plaintiff's President were all among the better sites, in terms of sales, in the Indianapolis area. In some cases, his efforts produced leases from landlords who had previously refused to negotiate with defendant's leasing personnel. As of June 16, 1971, there were eighteen (18) stores in the Indianapolis area. Fifteen (15) of these were franchise stores, all of which were located inside Marion County. Three (3) (IN-8, IN-12 and IN-15) were company stores, all of which were located in Johnson or Hendricks Counties. Between June 16, 1971, and March 26, 1974, no additional stores were opened in Marion or contiguous counties, nor were any existing stores closed or transferred. At no time prior to March 26, 1974, did a company-owned store operate within Marion County without the consent of plaintiff. Of the three (3) company stores which operated in the Indianapolis area (but outside of Marion County) for a significant period of time, two (2) (IN-8 and IN-12) had been operated at one time by plaintiff and rejected because of poor sales, and the third (3rd) (IN-15) had been offered to plaintiff

by defendant and rejected due to its distance from existing plaintiff's stores. Sometime in 1967 or early 1968, defendant began to employ the geographic and demographic characteristics of a "one mile radius" around a proposed site as the standard for analyzing the potential success of a proposed site for a store. Beginning at about the same time, defendant's personnel began to use the term "overlap" to describe proposed or actual sites which were located within two (2) miles of each other, *i.e.*, whose one (1) mile radii "overlapped." "Company competition unit" or "competition unit" is a term used by defendant to designate a store placed in close proximity to a competing drive-thru photoprocessing outlet. Defendant has intentionally overlapped competitive drive-thru stores even if it involved an overlap of defendant's own marketing area as well. It has maintained competitive units even when they are not profitable. The geographic area from which a defendant store draws customers depends upon a number of variables, including traffic patterns, population density, geographic barriers, and the type of shopping center in which the site is located. All stores can be expected to draw some customers from distances of more than one (1) mile. As a store grows older it draws from a larger area. In 1967 or 1968 defendant discovered that a store located within two miles from an existing store may draw away twenty percent (20%) of the customers of the existing store. This twenty percent (20%) rule was referred to from time to time by defendant's personnel involved in lease acquisitions and site installation. To determine the geographic area from which an existing store drew its customers, defendant early began the practice of conducting "pin studies" of existing stores. A "pin study"

consists of a street map of the vicinity of the store on which pins or marks are placed at locations corresponding to the addresses of the store's customers. Store customers are required to give their names and addresses when delivering film for processing. The names and addresses are recorded in a "processing log book" maintained by personnel at each store. In conducting "pin studies," defendant's practice has been to use the addresses of a group of one hundred (100) customers from the processing log book for the subject store. These studies continue to be used by defendant to analyze the expected and actual effect of one (1) store upon another. Pin studies are and were the most reliable method for determining the market area of a store. In the period 1967 through 1971, defendant attempted to avoid conflicts of market area between new company-owned stores and existing franchised stores. In several cases, proposed company stores were not built because of "overlaps" of the franchisee's market. From time to time defendant conducted pin studies of the franchised stores which were proposed to be overlapped, and thereafter concluded not to build the new company store. Prior to 1971, there was at least an understanding among defendant management, if not a formal policy, that a company unit would not overlap a franchised store. In 1971, the defendant's executives in charge of site selection believed that defendant had an obligation to the franchisees "to not intentionally pull customers from [the franchisee's] operating stores to ours [company stores] and to act in good faith in the performance of our positioning of the units relative to franchised stores." These beliefs and the understanding or informal policy against "overlaps" of franchised stores were based on defendant's knowl-

edge of the basis upon which the franchises were sold as well as a sense of fair dealing and good faith. At and before this time the franchise relations personnel "vetoed" proposed sites if they anticipated overlapping of a franchisee. The break-even point in annual sales for a company-owned store was and is not more than thirty thousand dollars ($30,000.00) per year. The incremental profitability of a company store in an established area may be as low as twenty-one thousand dollars ($21,000.00) to twenty-five thousand dollars ($25,000.00). Because a franchise must pay royalties, advertising fees, and rents to defendant which company stores do not pay, the break-even point to the franchisee for a franchise store was and is significantly higher than the break-even point for a company-owned store. The incremental break-even sales point for an Indianapolis franchised store was approximately thirty-six thousand dollars ($36,000.00) in 1969 or 1970, and has increased to approximately fifty thousand dollars ($50,000.00) today. The overall break-even point for plaintiff is approximately fifty-five thousand dollars ($55,000.00) exclusive of officer's salaries and fringe benefits and sometimes more than sixty-five thousand dollars ($65,000.00) after all expenses. At the time it sold the plaintiff franchise, defendant believed that it did not break-even on a franchised store until the store's sales reached five thousand dollars ($5,000.00) per month, or sixty thousand dollars ($60,000.00) per year. Defendant franchise sales literature cited this defendant break-even point as the reason "why location is so important to us and why we cannot afford any overlapping in your marketing area." In 1968 and 1969, defendant expected its average stores to attain annual sales of ninety thousand dollars ($90,-

000.00) per year after three (3) years and ninety-five thousand dollars ($95,000.00) after four (4) years. It intended to accomplish that result. However, it subsequently determined that greater saturation of each market was more profitable to its own company stores even though it also reduced the sales volume per store and may even produce losing stores for some period of time.

In the film processing industry it is the general practice that the price from the processor to the retailer is stated as a percentage or series of percentages off of the retail price. These percentage reductions in the retail price, used to arrive at the wholesale price, are referred to as "discounts." The retail price is generally placed on the packages of finished film by the processor prior to shipment to the retailer. Where the price involves a series of discounts (*e.g.*, forty-seven percent (47%) plus ten percent (10%)), the second (2nd) and successive discount percentages are applied to the net price after all previous discounts have been taken. For example, a retail price of one dollar ($1.00) yields a net price of forty-seven and seven tenths hundredths of a dollar (47.7 cents). Discounts which are not contingent upon further performance by the wholesale customer are known as "trade discounts." A trade discount may be a single percentage figure or a series of percentage figures. Given a set retail price, the size of the trade discount is generally related to the sales volume of the wholesale customer, with larger volume customers receiving larger trade discounts. In addition to the trade discount, some processors offer discounts which are available to the wholesale customer upon certain additional performance by the customer beyond the mere purchase of the processing. Examples

of such additional discounts are "cash discounts," and "advertising allowances". A "cash discount" (also known as a "prompt payment discount") is a discount which is contingent upon the payment of the processing invoice within a set period of time, *e.g.*, ten (10) days after presentment of the invoice. Cash discounts are generally offered by processors in order that the processor may promptly obtain use of the money owed it, and to eliminate the expense of collecting bad debts. A cash discount is rarely in amounts greater than two percent (2%) of the net price after deduction of previous discounts. A discount in excess of such percentage is not a cash discount. An "advertising allowance" is a discount which is contingent upon the performance of advertising by the wholesale customer. An advertising allowance is generally granted upon proof of advertising by the customer, and generally takes the form of a rebate to the customer or direct payment by the processor to the advertising medium. Advertising allowances are offered by processors to encourage advertising by their wholesale customers and thereby to increase wholesale processing sales. Advertising allowances are rarely granted in amounts greater than two percent (2%) or three percent (3%) of the net price after deduction of previous discounts. From 1968 to the present, processors with whom defendant has dealt for its Indianapolis processing have granted defendant net prices which are at or among the lowest of the prices offered by such processors to other wholesale customers. Defendant historically has dealt with independent processors on behalf of itself and its franchisees, consistent with the express provisions of most franchise agreements that the franchisees purchase processing from defendant or sources

designated by defendant. The processors have had little or no direct contact with franchisees. Defendant's ability to obtain favorable prices from processors has been and is principally due to the high volume of business which defendant offers to processors. Defendant has been able to offer the volume from several defendant "areas" to a single processor in exchange for favorable price terms. In addition, defendant performs related service functions which processors themselves customarily perform for customers other than defendant. These include pickup and delivery at individual stores, providing processing envelopes and customer service. On May 18, 1970, defendant instituted a general increase in the retail prices it and its franchisees charged for processing. At that time defendant retained and had not purported to waive the right to set its franchisees' retail prices. In conjunction with the price increase, defendant in April and May, 1970, demanded and received increases from most or all of its processors throughout the United States in the discounts used to determine the price paid the processors by defendant. An increase in the percentage of discount, if accompanied by an increase in the retail prices from which the discount is computed, does not necessarily lower the net price per roll to defendant. Accordingly, it is meaningless to speak of percentages of discounts in the abstract. The percentage is significant only in relation to the retail price to which it is applied. Defendant initially characterized the additional five percent (5%) discount extracted from processors in the spring of 1970 as a two percent (2%) "cash" discount plus a three percent (3%) "advertising allowance." The idea to characterize the 1970 additional discount as an "advertising allowance" was conceived by defend-

ant's Vice President and the defendant's principal processing negotiator. These "discounts" were not for prompt payment or advertising. The processors viewed their price as a stated price per roll, and paid no attention to whether it was described by defendant as retail less forty-seven percent (47%) and five percent (5%), retail less forty-seven percent (47%) and three percent (3%) and two percent (2%). They are identical. Defendant knew this and the negotiations with processors reached a price per roll then were converted by defendant into two (2) tier percentage discounts. This second (2nd) step was wholly irrelevant to the processors. Defendant's advertising and disbursement personnel were unaware of any "advertising allowance" from processors. Defendant did not establish a separate account for the "advertising allowances" which it began to receive in April and May, 1970, or in any other manner direct the "advertising allowances" into increased advertising. Cost savings representing the entire five percent (5%) additional discount was shown in defendant's financial reports as "other income" until 1973. By the end of defendant's fiscal year ending January 31, 1973, these amounts totaled approximately one point eight million ($1.8). At that time, on the advice of defendant's independent auditors, these sums began to be reflected as a reduction in cost of processing which is what they were. Defendant did not break down the discounts into their purported components for any business purpose before this litigation. In connection with the discount increase, defendant represented to some or all of its processors that it would pay the processor's invoice for a given month's processing by the fifteenth (15th) of the following month. Later processing agreements for Indianapolis

did not require payment within any specified time to obtain the full discount. Discount terms granted to defendant by its processors have been and are treated by defendant and its processors as highly confidential. Defendant instructed its processors to keep the discount terms confidential, including from defendant's own area managers. Within defendant, only a few officers and employees were aware of the discount terms. Defendant's outside counsel were unaware of the size of the discounts until sometime in early 1975 after this suit was filed, despite their active engagement since 1973 in negotiations with franchisees concerning the discounts. Defendant's area managers and its franchise relations director, the persons with whom the franchisees normally dealt, were unaware of the discounts from processors and remain so today except to the extent they have learned of them as a result of this litigation.

A franchise investment in 1968 involved a substantial risk to the investor for a large "upside potential". Defendant was also selling limited partnership interests at the same time and at the same price, but under an arrangement which offered both less risk and less potential gain. Shortly after its renewed expansion program began in 1972, defendant began to modify its earlier procedures and began to "overlap" franchised stores on a systematic basis. It established an internal procedure that referred these decisions to the franchise relations department rather than the real estate department. In 1973, defendant devised a "four point program" in response to a Kansas City franchisee's objection to defendant's placement of stores in proximity to a franchised store. The program provided that if a store were opened within two (2) miles of a fran-

chised store, the franchisee could either (1) buy a franchise for the store for twenty-one thousand dollars ($21,000.00) and take a lease at three hundred seventy-five dollars ($375.00) per month, (2) choose either unit within six (6) months of the opening of the new unit (3) sell the franchised unit back to defendant "at a negotiated price" (defendant represented that franchisee could choose a unit if, after a sufficient time, it is determined to close one of the units), or (4) do nothing. This four (4) point policy was not disclosed to plaintiff until June, 1974, when IN-24 was placed in Indianapolis within one and one-half (1½) miles of IN-20, then one of plaintiff's best stores with an annual sales volume of eighty-eight thousand four hundred seventy-one dollars ($88,471.00). Plaintiff did exercise the option to buy and that store, IN-24, became its sixteenth (16th) store. Plaintiff believed at the time it purchased IN-24 that the location was not good. However, plaintiff hoped to deter defendant from placing additional overlapping stores in Marion County and purchased IN-24 to "set a precedent". In 1974 two (2) other stores were installed within two (2) miles of a plaintiff's store. One of these, IN-21, was installed before the installation of IN-24 and one, IN-27, was installed thereafter. Neither of these was offered to plaintiff under the four (4) point program and, when such omission was called to defendant's attention, defendant's response was to ignore plaintiff's requests. After plaintiff purchased IN-24 there was a lull until October 17, 1974. Then, beginning on October 17th and up to the date of trial of this case, ten (10) more stores were opened in and around Marion County. In March, 1975, in its next four (4) option offer, Defendant announced that the price for a fran-

chise store was now thirty thousand dollars ($30,-000.00) and the required monthly rental would be five hundred dollars ($500.00) per month. It is not economically feasible for plaintiff to accept new stores on those terms, a fact which was known to defendant. Instead, plaintiff accepted the option to trade IN-24 for the new site. The new site overlapped both IN-24 and IN-20.* The effect of defendant's refusal to move IN-24 was to cause losses to plaintiff. To the time of trial, plaintiff had incurred losses attributable to its purchase of IN-24, and its subsequent exchange of this store for IN-28, in the amount of twenty-four thousand three hundred nineteen and twenty-five hundredths dollars ($24,319.25). Since March of 1974 defendant has opened fourteen (14) new stores in the Indianapolis metropolitan area. Twelve (12) of these represent new sites, while two (2) of them are relocations. Over one-half (½) of the new stores since 1973 have physically overlapped existing stores in Marion County, Indiana. The national average of overlap in 1976 was about thirty-three percent (33%). Defendant has never closed an overlapping store pursuant to the four (4) point optional program. Defendant established no procedure for monitoring sales of overlapped franchised stores and did not review the overlapped stores to determine the effects of the overlap on the existing stores. It is not possible to measure the impact of a new store on sales of existing stores with precision.

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*In early 1975, plaintiff requested that IN-24 be relocated due to poor sales and resulting losses to plaintiff. Defendant denied that request. At the time of the exchange of IN-24 for the new site, plaintiff again requested that defendant remove IN-24 because the area could not support two stores. That request too was denied by defendant even though its operational personnel were then recommending the removal of IN-24.

However, it is clear from the evidence that the new company stores in Indianapolis have been the principal cause of the decline in plaintiff's sales from one million seventy-one thousand six hundred seventy dollars ($1,-071,670.00) in the fiscal year ending March 31, 1975, to one million forty-one thousand one hundred fourteen dollars ($1,041,114.00) in the fiscal year ending March 31, 1976. A further decline of sixty-eight thousand two hundred twenty-seven dollars ($68,227.00) was experienced in the six (6) months ending September 30, 1976, compared to the six (6) months ending September 30, 1975, and the decline continued through the trial of this case. The most recent data, for January, 1977, shows plaintiff's annual sales at approximately nine hundred thousand dollars ($900,000.00) (or fifty-six thousand ($56,000.00) per store). Consistent with defendant's "optimum" sales level, no plaintiff's store today exceeds an annual sales level of seventy thousand five hundred seventy-six dollars ($70,576.00). By comparison, prior to the effect of the overlaps three (3) plaintiff's stores (IN-1, IN-7, and IN-17) had attained all-time sales highs in excess of ninety thousand dollars ($90,000.00) per year, and two (2) others (IN-18 and IN-20) exceeded eighty thousand dollars ($80,000.00). Fotomat has a "Standard Forecasting Curve" which projects the anticipated average sales volumes for stores of various ages. If plaintiff's stores had performed according to the curve as computed in 1975, plaintiff's sales in its fiscal year ending March 31, 1976, adjusted to reflect the Indianapolis history to March 31, 1974, relative to this national average, would have been one million one hundred fifty-seven thousand nine hundred seventy-two dollars ($1,157,972.00). This curve is a statistical summary

of the experience of all stores nationwide. As such it includes the effect of competing stores, economic fluctuations such as booms and recessions and other possibly relevant factors. Once a store attains the two thousand five hundred dollars ($2,500.00) per month sales level, plaintiff's profit margin on each additional sales dollar is thirty-three percent (33%) of gross sales. Plaintiff's management, overhead, rent and other expenses are substantially fixed. Only cost of processing, and cost of film, royalties, and advertising allowance increase with additional sales volume. Fotomat has intentionally placed its stores in places where it knows the store will draw business from plaintiff. This has been done to accomplish the seventy thousand dollars ($70,000.00) "optimum" sales level and to preempt the site. This has principally occurred where a franchise store has attained a sales volume in excess of eighty thousand dollars ($80,000.00) but may occur where the franchised store is at a lower sales level. The effect is to prevent the store from attaining the ninety thousand dollars ($90,000.00) level that defendant and the franchisee expected a three (3) year old store to reach and that defendant described as "satisfactory" in its franchise sales materials. The higher sales level that represented the upside potential of the risk investment is frustrated. This intentional drawing of business from the franchisee has occurred with respect to plaintiff's stores IN-20, IN-17, IN-7, IN-10, IN-5, IN-6, IN-1, IN-18, and IN-2. The latest twelve (12) month sales figures for these stores are down in amounts up to forty-two percent (42%) from their levels immediately before the company store was installed. The impact of saturation of the drive-thru market in Marion County, Indiana, has reduced sales to some extent

by all of plaintiff's stores. Defendant's attempts to attribute this decline to other factors are wholly unpersuasive. Advertising in Indianapolis has not differed significantly from that in any other market. Processing quality, if the cause of a sales decline, would necessarily appear at the same time in all stores. Yet the high point of each of plaintiff's declining stores is in most cases immediately prior to the time of installation of new stores in the area of the existing store. These occurred at different times ranging from early 1974 to 1976. Plaintiff is the only major customer of plaintiff's processor with declining sales in 1976. Another major customer in Indianapolis of such processor experienced a thirty percent (30%) increase in 1976. The "recession" of 1974-1975 had little or no general effect on processing sales. Plaintiff's sales declined in 1976. Plaintiff's management of the store and supervision are the same as they were before the declines began and are also uniform over all stores. There is no indication plaintiff's management quality has declined, and defendant's older company stores in Indianapolis have suffered sales declines even more than plaintiff. Moreover, if these factors were the cause of a decline, they would be expected to show up more or less at the same time in all plaintiff's stores, which has not happened. Indeed some of plaintiff's stores continue to be successful, although the general saturation of the Indianapolis drive-thru market has taken some sales from all stores. The only credible causes of plaintiff's sales decline, besides the new company-owned stores, are also attributable to defendant. These are (1) defendant's refusal to relocate poorly located stores such as IN-24 and IN-9, (2) defendant's use of another processor for prints, and (3) as discussed below, defendant's

general inattention to plaintiff and lack of cooperation since 1973.

In August, 1968, and before, defendant purchased virtually all of its film from Eastman Kodak Co. or Polaroid Corporation. Photoprocessing was purchased from independent photoprocessors located throughout the United States. Until 1972, defendant neither owned nor operated photoprocessing plants of its own, nor did it market film under its own brand name. Defendant's photographic processing is divided into two (2) broad categories: "print" (*i.e.*, "pictures") and "chrome" (*i.e.*, slides and movies). Print processing comprises the vast bulk of defendant's and plaintiff's processing sales. Chrome and print demand different processing equipment and chemicals. A number of processing plants which perform print processing do not perform chrome processing. Print work is a "totally different business". Beginning in 1972, as detailed below, a subsidiary of defendant, whose successor is known today as Fotomat Labs, Inc., began to perform defendant's print processing in various parts of the country. Fotomat Labs, Inc. now does all of defendant's print processing for its company and partnership stores, and for some franchisees. It has been defendant's goal for several years to place all print processing with Fotomat Labs, Inc. Print processing is generally delivered to and from the processor by ground transportation. As a result, processing plants are generally located within two hundred (200) or three hundred (300) miles of their wholesale customers.

Beginning in October, 1968, and continuing until November 1, 1974, plaintiff purchased all of its print processing from defendant. From 1968 until February, 1972, the print processing was performed at a process-

ing plant in Indianapolis owned and operated by Carhart Photo, Inc., a Rochester, New York, based firm. From February, 1972, until May, 1974, it was performed at the same plant under ownership by a joint venture between subsidiaries of Carhart and defendant. Beginning in May, 1974, the plant was again independently owned by Carhart and continued to do the processing for the Indianapolis area defendant's stores. Defendant paid Carhart or the joint venture for the processing services which it resold to plaintiff. Prior to May, 1970, print processing sold to plaintiff was purchased by defendant from Carhart at the defendant's retail price less a forty percent (40%) or forty-two percent (42%) trade discount. Defendant in turn billed plaintiff at the same price. Beginning sometime prior to April, 1970, defendant began receiving an additional two percent (2%) discount off the amounts owed Carhart after deduction of the forty percent (40%) discount. This additional discount was not passed on to plaintiff. Instead, defendant continued to bill plaintiff at a price determined by deducting only the forty percent (40%) or forty-two percent (42%) discount from the respective retail prices for print and chrome. Effective May 18, 1970, the same date as the retail price increase, the discount percentage applicable to defendant's Indianapolis area print work performed by Carhart increased to forty-seven percent (47%) plus five percent (5%). Defendant's invoices to plaintiff passed through the increase in the initial trade discount percentage from forty-two percent (42%) to forty-seven percent (47%), but continued to fail to pass through the additional discount, which had now increased from two percent (2%) to five percent (5%). Defendant's Indianapolis expenditures for advertising during its fiscal year ending

January 31, 1970, prior to receiving the additional discounts from processors were thirty-one thousand one hundred ninety-five dollars ($31,195.00). This was approximately eight percent (8%) of gross retail sales in Indianapolis. In its fiscal year ending January 31, 1971, advertising expenditures were reduced to thirteen thousand eight hundred forty-one dollars ($13,841.00) which was approximately two percent (2%) of gross sales by plaintiff. This did not even reflect the three percent (3%) of sales paid by plaintiff and required to be spent for advertising under the franchise agreements, much less any payments from processors allegedly for advertising as a result of the additional discounts instituted during that year. Plaintiff at all times has had sufficient short-term borrowing capacity to avail itself of a true prompt payment allowance were such an allowance available to it on its current billings. Defendant did not undertake to inform plaintiff or any other of its franchisees of the additional five percent (5%) discount received from its processors beginning in 1970. Beginning sometime from mid-1970 to early 1972, plaintiff's President began to believe that a two percent (2%) cash discount and a three percent (3%) advertising allowance was available to defendant that was not being passed on to plaintiff. However, the true nature of this discount (*i.e.* it was neither a cash discount nor an advertising allowance) was not known to plaintiff or its personnel. No written notice of these or any other discounts was ever sent to plaintiff. Beginning in 1971, defendant's buying power had increased to the point where it could receive a ten percent (10%) discount in addition to the forty-seven percent (47%) "trade discount" it disclosed to its franchisees as the "cost" of print processing. Begin-

ning in June, 1971, this additional ten percent (10%) was available from Snap Photo in Evansville, Indiana, which had the ability to service Indianapolis and was, in fact, used by Fotomat for its Nashville, Tennessee, stores. Snap Photo's quality and service were and are adequate to meet defendant's standards. Plaintiff and its personnel did not learn of the availability of this ten percent (10%) discount from Snap until late 1974. Snap Photo was not informed by the defendant of the availability of plaintiff as a customer. Beginning in February, 1972, defendant began its entry into processing via a fifty percent (50%) interest in the Carhart Indianapolis plant. Defendant did not advise plaintiff of the availability of the additional ten percent (10%) from Snap Photo or from Carhart itself in other parts of the country where Carhart did defendant's processing. The joint venture was dissolved in May, 1974. From its beginning until November 1, 1974, defendant continued to sell plaintiff its processing at the forty-seven percent (47%) trade discount as it had since 1970. After dissolution of the joint venture defendant obtained an additional ten percent (10%) discount from Carhart for its own processing in Indianapolis, Cincinnati, Louisville and Dayton and also plaintiff's processing. No disclosure of this ten percent (10%) was ever made by defendant. There is no single "prevailing market price" for print processing. Generally, the price varies according to the volume of the retailer and the type of services which the processor performs for the retailer. Defendant buys in large volumes and does its own pickup and delivery service and has received prices below those offered to other retailers. The prevailing market price for print processing in the Indianapolis market to large-volume purchasers such as plaintiff which perform their own pickup and delivery

has been a discount of forty-seven percent (47%) plus ten percent (10%) off the Fotomat retail price since at least February, 1972. Plaintiff's business was large enough that it could obtain the same discounts.

Beginning in October, 1968 and continuing until the present, plaintiff purchased all of its chrome processing from defendant. During the same period defendant purchased all chrome processing sold to plaintiff from Dynacolor, Inc., a division of 3M Company. The chrome processing was performed at a Dynacolor plant located in Aurora, Illinois, a suburb of Chicago. The film was transported by air daily from Indianapolis to Aurora. Chrome processing initially sold to plaintiff was purchased by defendant from Dynacolor at the defendant's retail price less discount of fifty percent (50%) or fifty percent (50%) less two percent (2%). Defendant in turn billed plaintiff for the chrome processing at fifty percent (50%). In 1969 a "cash discount" was taken and effective in April, 1970, the discount percentages applicable to defendant's Indianapolis area chrome work performed by Dynacolor increased from fifty percent (50%) plus two percent (2%) to fifty percent (50%) plus five percent (5%).

Film (principally purchased from Kodak) was initially sold to the franchisees at defendant's raw cost *i.e.* the dollar price paid to the supplier, except for a two percent (2%) true prompt payment discount. Use of raw cost was the intent of both parties pursuant to paragraph F-9.1 of the franchise agreement. Defendant introduced private label defendant brand film in 1971. This film was and is manufactured by others and sold to defendant at prices that are not available to the public or plaintiff. Unknown to plaintiff, defendant had charged plaintiff from seven percent (7%)

to twenty-six percent (26%) over its cost of the film sold to plaintiff. There are no significant overhead expenses attributable to defendant brand film which are not also incurred for Kodak film.

In 1971, defendant sent plaintiff and all other franchisees a letter advising the franchisees that they could use any processor they wished despite the contractual provision in paragraph F-8.6 of the franchise agreements. Defendant in the same letter assured its franchisees that it was selling processing at its cost without any markup whatsoever. Accordingly, in view of defendant's known dominant buying power, in the absence of quality problems, the franchisees had no motive to seek alternative sources because they believed they were receiving the best available prices. At the same time it purported to waive the provisions of paragraph F-8.6 of the franchise agreement, defendant adopted an undisclosed but firm policy that any franchisee who did switch print processors would have to supply his own pickup and delivery and must also switch chrome processors. Before September, 1974, defendant enforced this policy against a franchisee. The purpose of both the confidentiality of the discounts and the requirement that any franchisee seeking to use his own processor must supply his own pickup and delivery and his own chrome processor was to attempt to retain the processing for defendant. This had the effect of giving defendant the benefit of the discounts on the franchisees' business and at the same time deprived the franchise of that benefit. It was identical in effect to enforcement of the contractual tying clause that Fotomat purported to abandon in 1971. Defendant by this device hoped to retain the franchisees' agreement to use defendant's processors. Plaintiff did continue

to agree to purchase from defendant until November 1, 1974. By 1974 the agreement was restraining approximately four hundred fifty thousand dollars ($450,000.00) per year in print processing volume that otherwise would have been open to competitors, such as Colorcraft Corporation in Louisville, Kentucky, in interstate commerce. The royalty was to compensate defendant for its pickup and delivery service for the franchised stores which was required to be furnished according to the terms of the franchise agreement. Defendant's pickup and delivery (sometimes called "routing") service is of significant value to plaintiff. There is no operational reason why a change in print processor should require a change in chrome processors. If anything, such an additional change creates more problems for both the franchisee and defendant. There is no basis in quality control for defendant's insistence on a change in chrome processing. In the summer of 1974, plaintiff began looking for another print processor because of severe quality problems at the Carhart Indianapolis plant. In September, plaintiff told defendant that it intended to switch its print work to Colorcraft Corporation in Louisville, Kentucky. The processor had the capacity to handle plaintiff's print volume since May of 1970. Defendant responded by threatening to require plaintiff to change its chrome processing and do its own pickup and delivery and customer service. Plaintiff had no desire to move its chrome processing from Dynacolor and was uncertain whether satisfactory chrome processing could be obtained elsewhere. Plaintiff had a contractual commitment from defendant to provide pickup and delivery services in return for the royalty paid and saw no reason to incur that expense itself. This threat exerted substantial

economic leverage over plaintiff. One of the reasons such processor offered plaintiff a certain price was because of the savings to the processor in the elimination of making sixteen (16) separate pickups and deliveries. Defendant advised Carhart of the prospect that plaintiff might change processors. The price in defendant's then current contract with Carhart, entered into at the time of the dissolution of the joint venture, was based on an assumed volume of business that included defendant's company stores in Indianapolis, Louisville, Cincinnati, Dayton and also plaintiff's stores. Carhart had been told by defendant to deal only with defendant, not the franchisee, and Carhart had been unaware of the extent of plaintiff's dissatisfaction with Carhart's quality. Carhart's Vice President called on plaintiff's President on September 17, 1974 in an effort to persuade him to stay with Carhart. Plaintiff's President determined in that meeting that Carhart had been giving defendant an additional ten percent (10%) discount. This ten percent (10%) amounted to over forty-three thousand dollars ($43,000.00) per year on plaintiff's business at its 1973-74 level. In the spring and summer of 1974, a St. Louis attorney had been negotiating with defendant on behalf of the Griesedieck Enterprises, a franchisee of defendant. Such lawyer advised plaintiff that he believed defendant was caving in on the issue of its right to keep the discounts. Plaintiff's attorneys then contacted defendant's Vice President and general counsel, who had been negotiating with such attorney. On October 1, 1974, such officer and attorney of defendant sent plaintiff four (4) documents explaining defendant's position as to its right to retain the discounts on franchisees' business. One was a letter from defendant's attorneys explaining "The

logic of Fotomat's position." It maintained that the discounts were "cash" discounts, *i.e.* discounts for prompt payment, and took the position that if defendant could not retain the discount it would not claim it at all. This "logic" is plainly fallacious. First, Fotomat dealt with Carhart at the time on behalf of sixteen (16) franchised stores and over thirty (30) of its own stores in Indianapolis, Louisville, Cincinnati and Dayton. The Carhart contract applied to all stores. Obviously, it would be in defendant's interest to get the best deal it could for its own stores, even if it also benefited the franchisees. Second, defendant had sold its franchise in part based on claims of its buying power; it had a duty to attempt to secure that power for the franchisee if it could. Third, and perhaps most significant, the discounts were plainly *not* cash discounts at all, but were volume discounts based on defendant's large purchasing power and the fact that defendant performed pickup and delivery to the stores. Defendant had, of course, agreed to perform that service for its franchisees and received a royalty for it. A second justification offered by defendant to plaintiff was an affidavit of defendant's controller relating to the St. Louis area which was apparently designed to establish that defendant had not made a profit on its St. Louis franchise operations and implied the same was true for Indianapolis. Defendant's obligation to sell processing at cost under the agreement does not relate to the overall profitability, or lack thereof, of all dealings with the franchisees. The affidavit included statements that were materially misleading. These included the statement that the "cash discounts" attributable to the St. Louis franchisees' business was thirty-one thousand sixty-three dollars ($31,063.00) in

fiscal 1974. In context it is clear that the reader was to believe that all discounts were "cash" discounts as justified by the accompanying letter referred to above. The affidavit was stated to show that defendant was not profiting at the franchisees' expense. The discounts for that year were fifty-four thousand six hundred ninety-three and thirty hundredths dollars ($54,693.30). The defendant's personnel involved in dealing with the franchisees were aware of the magnitude of these discounts at the time. The third document supplied by such officer and attorney of defendant explained that defendant's position was "in large part" based on a California statute prohibiting predatory sales below cost. Defendant had been advised by its outside counsel that such statute had no application to sales made outside of California. On October 10, 1974, plaintiff threatened to sue defendant if it maintained its position that a change in print processors would result in discontinuation of pickup and delivery and chrome processing. Plaintiff demanded an accounting for past discounts received by defendant on plaintiff's processing. Plaintiff at the time did not want to sue defendant and was hopeful that a lawsuit could be avoided. Prior to November 1st, plaintiff negotiated a print price from Colorcraft of forty-seven percent (47%) plus ten percent (10%) which was the identical price obtained by defendant from Carhart in 1974. No part of the additional ten percent (10%) discount which plaintiff began receiving from Colorcraft in November 1, 1974 was for "advertising" or "cash." Colorcraft personnel testified that the entire forty-seven percent (47%) plus ten percent (10%) was a "trade" discount. The terms offered plaintiff were identical to the terms under which Colorcraft was the performing print proc-

essing for defendant in the Norfolk, Virginia, area. Since November, 1974, plaintiff has paid Colorcraft invoices at times ranging from twenty-five (25) to over ninety (90) days from the date of the processing. No penalty was imposed nor was any protest made by Colorcraft to the time of payment. In a letter to plaintiff dated October 23, 1974, defendant agreed to continue customer service and pickup and delivery, but only until January 31, 1975. Believing that litigation would not be necessary, plaintiff proceeded to implement its change to Colorcraft effective November 1, 1974, and await defendant's advice as to the amounts of discounts involved. At this time plaintiff still had no knowledge of the discounts as to chrome work and had only a suggestion that defendant's brand film was not being sold at cost to the franchisees. Defendant was not making any effort to compute the amounts involved. Defendant's purpose in adopting an apparently conciliatory posture was to attempt to forestall litigation in hopes of successfully asserting its one hundred twenty (120) day contractual limitation period as to contract breaches. Defendant believed it had nothing to lose by litigation, and had no intention of compromising or modifying its position. After exchange of telephone calls in November, plaintiff in late November received a letter from such officer and attorney of defendant stating that a Kansas City franchisee had sued defendant in San Diego and that defendant was awaiting the outcome of that suit. This suit was filed on December 20, 1974. In January, 1975, faced with a possible January 31st cutoff in services, plaintiff agreed to not seek a preliminary injunction in return for defendant's agreement to maintain services during the pendency of this action, providing that either party could revoke the agreement on thirty (30) day notice. It

made clear, however, that it denied any obligation to continue services. That status continued to the end of the trial. Defendant enforced such policy against other franchisees who switched their processing from defendant.

Beginning in October, 1968 and continuing to the present, defendant has supplied plaintiff with price lists setting forth retail prices for processing, film and merchandise sold to plaintiff. The list for film and merchandise was furnished on a monthly basis and contained figures setting forth both the retail price and the purported "cost" of the film and merchandise. Throughout its existence, plaintiff has charged its customers the retail prices contained in the price lists provided by defendant and defendant has billed plaintiff for film and merchandise at wholesale prices equal to the purported "cost" for the respective items listed on the price lists furnished to plaintiff. These "cost" figures do not reflect the "discounts" received from film manufacturers or the markup of defendant brand film. Plaintiff's President, who also had experience with a small drugstore chain, was aware of the availability of advertising allowances and perhaps also cash discounts from some processors, as early as mid-1970. However, the discounts with which he was familiar were true advertising allowances, *i.e.*, proof of advertising was required. Plaintiff had no knowledge of the film markups or chrome discounts until after this suit was started. It had no knowledge of the ten percent (10%) print discount either from Carhart or Snap Photo until September, 1974. Defendant actively concealed these facts from plaintiff.

Plaintiff was required under the master franchise agreement and all subsequent individual franchise agree-

ments "as an express condition of" the grant of the franchise to lease from defendant the kiosks and the ground on which they were located. The base rent specified in all of the agreements actually made was three hundred seventy-five dollars ($375.00) per month. Each four (4) point option offer of a franchise to plaintiff in 1974 and 1975 was on "the same terms and conditions" including the requirement of a lease of the kiosks, except the rent became five hundred dollars ($500.00) per month after IN-24 was purchased. Under the agreements, plaintiff assumes the cost of all utilities and other charges except real estate taxes. Defendant in turn entered into ground leases with the shopping center owners at monthly rents ranging from one hundred fifty dollars ($150.00) to three hundred dollars ($300.00). These leases utilizing a standard defendant form uniformly placed the burden of real estate taxes on the landowner. None contain a cost of living escalator during the first ten (10) years of the term. Defendant has constructed the kiosk buildings in its own factory at a cost ranging from approximately four thousand five hundred dollars ($4,500.00) in 1968 to five thousand one hundred dollars ($5,100.00) today. Additional expenses of several thousand dollars per location were incurred in locating the sites and installing the kiosks on site. Defendant also has in some high volume months paid small additional rents to the landowners under rent override clauses in the ground leases. The kiosk buildings could have been constructed by plaintiff utilizing independent sources at costs ranging from slightly under three thousand five hundred dollars ($3,500.00) in 1969 to slightly less than four thousand dollars ($4,000.00) in 1971, the last year any of its original fifteen (15)

stores were installed. There is no operational reason why plaintiff could not have either constructed its own kiosks or purchased them outright from defendant. Plaintiff also was capable of locating suitable sites and negotiating ground leases had it been permitted to do so under the franchise agreements. An aggregate reasonable rental of the land and kiosks leased to plaintiff was and is three hundred seventy-five dollars ($375.00) per month, the base rent specified in the leases. During the first five (5) years of each lease, plaintiff incurred no damages from the contractual requirement that it lease from defendant. In 1973, however, defendant began enforcing the five (5) year rent escalator clause contained in the lease, which caused an immediate increase in the rents paid by plaintiff by approximately one hundred dollars ($100.00) per store per month. Because the underlying ground leases contained no corresponding cost-of-living escalator, and because parties other than defendant (*i.e.*, plaintiff or the landowners) bore expenses for taxes and utilities, the increased rents charged plaintiff bore no relationship to any expense increases incurred by defendant. Maintenance expenses were to be paid for by the franchise royalty rather than kiosk rent. Annual rent paid by plaintiff to defendant increased from sixty-eight thousand seven hundred dollars ($68,700.00) in fiscal 1973, the last year prior to the rent escalator, to one hundred one thousand three hundred forty-three dollars ($101,343.00) in fiscal 1976. The actual rent paid by plaintiff in excess of the reasonable monthly cost to the date of the second supplement to the complaint was eighty-one thousand three hundred sixty-eight dollars ($81,368.00). Defendant never waived its express requirement that plaintiff

lease only from it until the year 1977 during the trial of this case.

Fotomat Labs, Inc. is a wholly owned subsidiary of defendant. Beginning with the Carhart venture in 1972 it has been in the business of print processing for defendant. It is a separate corporation from defendant. Fotomat Labs, Inc. has been quite profitable. It was for some time defendant's goal to place all of defendant's print processing with Fotomat Labs, Inc. and that has now been substantially accomplished. Defendant engaged in actions to deter franchisees from using independent processors and such actions were designed, among other things, to keep the franchisee's business for Fotomat Labs, Inc. These actions were by agreement among the President of Fotomat Labs, Inc. and the President of defendant, and others. The volume of print processing that was switched from Carhart to Colorcraft in Louisville, Kentucky, was approximately four hundred fifty thousand dollars ($450,000.00) annually. If still purchased from defendant, that processing would now be performed by Fotomat Labs, Inc. at its St. Louis, Missouri, plant at a profit of approximately one hundred twelve thousand dollars ($112,000.00) to one hundred thirty-five thousand dollars ($135,000.00) annually. If defendant is successful in reacquiring plaintiff, the effect will be to recover plaintiff's business for Fotomat Labs, Inc. Defendant's efforts to reacquire plaintiff are directed to that end.

Defendant acknowledged in its May 19, 1971, letter to franchisees that it could only recommend, not require, retail price levels of the franchisees' stores. Paragraph F-4.5 of the franchise agreement provides that no royalties are required as to items "required" to be sold below the franchisee's cost. That provision, in light

of the waiver of the right to fix the franchisees' prices, is understood by defendant to apply to sales at "recommended" prices below the franchisees' cost. Because defendant's advertising includes pricing defendant prefers, but does not insist, that franchisees follow recommended prices. In view of the provision in paragraph F-8.7 that purported to give defendant power to set franchisees' prices, paragraph F-4.5 of the same agreement should be construed to apply to "recommended" prices after defendant waived its contractual power to require compliance with its pricing. In recent years defendant has insisted on collection of royalties as to sales of film below plaintiff's cost.

Defendant's cash discounts from Kodak on film sold to plaintiff are true cash discounts. They are for prompt payment and allow a two percent (2%) discount if the invoice is paid by the tenth (10th) of the month. Defendant refused to make this available to plaintiff even if plaintiff was current on its payables.

Beginning in the year 1973, defendant began to attempt to shift minor costs to plaintiff including those of hiring and firing of Fotomates, training of Fotomates, supervision of stores and other items. Defendant in the past two (2) years also has eliminated its practice of holding monthly meetings for franchisee Fotomates and has begun to exclude franchisee employees from defendant's sales incentive programs. When plaintiff switched its processing to Colorcraft, Fotomat Labs, Inc. told its processing liaison man who had worked with problems at Carhart to have nothing to do with Colorcraft. Defendant also discontinued its twice-daily pickups at the time of the Colorcraft takeover.

During the years 1970, 1971 and 1972, defendant failed to expend for advertising allocable to the In-

dianapolis market the amount of plaintiff's three percent (3%) advertising contributions in those years. The defendant's expenditures for national advertising in such years were not properly allocable to the Indianapolis area.

Defendant now has fourteen (14) stores in the Marion County area and plaintiff has sixteen (16). There are approximately nine (9) other drive-thru photoprocessing stores in or around Marion County. These stores are newly established and have less than their proportional share of the dollar volume of business. Three (3) competing drive-thru kiosks have collapsed and withdrawn from the business in January, 1977. Each of the three (3) were located within two (2) miles of one (1) or more Fotomat units. There are few, if any, remaining highly desirable locations for drive-thru kiosks in Marion County but some remain outside the county that are in a position to compete with stores in Marion County. The staying power of kiosks in Marion County other than those operated by defendant or the only other sizeable processor, Fox Stanley, Inc., is unclear at best. The relevant geographic market for purpose of the plaintiff's monopolization claims under both state and federal law is Marion County and its immediate environs. The Court judicially notices that mass transportation media play a very small role in Indianapolis which is largely dependent on the private automobile for transportation both to and from work, for shopping and other purposes. Retail processing delivered to the amateur photographic consuming public by the drive-thru method has a very low or no significant price cross elasticity with other methods of retailing processing. Defendant's customers and customers of other modes of retailing are principal-

ly motivated by convenience of the drive-thru method of marketing. Price is a relatively insignificant factor in the customers' selection of a source of processing. The consuming public utilizes drive-thru stores and others such as drugstores and supermarkets wholly or largely without regard to relative prices because these methods of delivery of processing services are most convenient to them. What is convenient for a given consumer under given circumstances may or may not be convenient for the same person under different circumstances or different consumers. Accordingly, only twenty-five percent (25%) of defendant's customers use it exclusively. However, the decision to use drive-thru kiosks is not price related and, therefore, there is little or no price cross elasticity with other methods. When it is convenient to use drive-thru the bulk of the consumers will do so without regard to price. Defendant's processing prices are fifteen percent (15%) to twenty percent (20%) above those of most other retailers in Indianapolis and are approximately twenty percent (20%) above all of the discount and chain drugstores that, with defendant, share the bulk of the overall photoprocessing dollar. Defendant does not advertise its processing prices, except for signs at the stores. Defendant has the power, and has exercised it on occasion, to raise prices without significantly affecting the volume of its business. The most recent price increase occurred on March 1, 1977. Proximity of other modes of delivering photoprocessing services to the public (drugstores, supermarkets, discount houses, camera stores) does not have a clear impact on the sales of a defendant unit. Defendant generally ignores these other forms of delivering photo processing and focuses on existing drive-thru locations in selecting

sites for its stores. Overlaps by existing defendant stores in Indianapolis have caused declines in sales but there is no evidence that nondrive-thru processors have had a similar effect. Other drive-thrus are properly regarded by defendant as its direct competition. The drive-thru retail photographic processing business has achieved recognition within the photographic industry as a separate method of doing business and a separate market. It constitutes a submarket within the retail photographic processing market in Indianapolis. Barriers exist to entry into the submarket in Indianapolis. These include the need to have several stores in a given geographic area in order to render such an operation feasible and the substantial financing necessary to enter the submarket with national advertising. Defendant's effort to "blitz the industry" has succeeded in Indianapolis and today the submarket is at or near its saturation level of drive-thru kiosks. Defendant's objective in the year 1969 to use "rapid market penetration" "to obtain market dominance" has been met in Indianapolis.

Defendant has, since approximately the year 1970, been engaged in a program of reacquiring its own franchises. Defendant is well aware that the more profitable the franchise is, the more expensive and difficult it is to reacquire it. Defendant has intentionally attempted to reduce the profitability of plaintiff. Among the actions taken in this respect are the concealment of discounts available from processors, retention of discounts from processor, the markup of film, the placement of company stores in such a manner as to siphon business from plaintiff, attempts to coerce plaintiff into remaining with Carhart, refusal to relocate losing stores, insistence on escalating rents and a number of miscellaneous found facts. Each of these was designed to

reduce plaintiff's profits for purposes of reacquiring plaintiff's stores at the lowest possible price. Most are breaches of contract and all are overt acts in furtherance of defendant's attempt to monopolize the Indianapolis drive-thru market. There is a dangerous probability that defendant will acquire a monopoly of the Marion County drive-thru submarket if it continues these actions. Defendant has acted in complete disregard of its contractual obligations to plaintiff. Indeed, those persons responsible for defendant's policies with respect to plaintiff testified that they did not know what the franchise agreement provided in some obviously relevant areas and made no effort to find out. Defendant has intentionally set out to reduce plaintiff's profit with the ultimate objective of reacquiring the franchise at modest cost. Plaintiff's demand in the fall of 1974, prior to litigation, was for two (2) points: (a) an acknowledgement of its right to change print processors without a change in chrome processors and without interruption of pickup and delivery; and (b) settlement of its claims for discounts and overcharges which were in the aggregate of approximately one hundred eighty thousand dollars ($180,000.00) at that time. Defendant elected to make no effort to settle, although most of plaintiff's claims at that time were not subject to serious challenge. Defendant gave in on most of them when trial and an adverse judgment became imminent as found herein. In sum, this litigation itself has been utilized by defendant as an instrument to drain plaintiff for purposes of ultimately buying plaintiff out at an inadequate price. Defendant has been successful in ruining plaintiff's business. In May, 1974, plaintiff was generating an annual profit of approximately forty-six thousand

dollars ($46,000.00). In addition, plaintiff would have realized an additional profit of approximately sixty thousand dollars ($60,000.00) if defendant had passed through all processor discounts and sold film at cost. These amounts are in addition to the forty-four thousand dollars ($44,000.00) plaintiff paid its officers as salary. For the thirty (30) months beginning April 1, 1974, and ending September 30, 1976, plaintiff's additional profits would have been one hundred twenty-four thousand three hundred five dollars ($124,305.00) but for defendant's wrongful acts. That amount is in addition to the discounts and markups, increases in lease rentals and additional expenses claimed by plaintiff. The value of plaintiff's business at the time of trial was zero. Its value in September, 1976, and thereafter would have been five hundred thousand dollars ($500,000.00) but for defendant's wrongful acts. Plaintiff's officers' salaries are not unreasonable for a corporation of its size. Defendant's actions have already caused a substantial decline in interstate commerce in film, chrome processing and print processing from Colorcraft, and threatens to further adversely affect that commerce. Cooperation from defendant and its area office are essential to the operations of plaintiff under the contracts. That cooperation has deteriorated since the filing of this action. As recently as May, 1976, defendant again refused plaintiff's request to relocate a store (IN-9) in a declining neighborhood which is causing severe losses to plaintiff, except on the condition that plaintiff obtain an alternative lease and pay all cost of the move. Defendant's practice of overlapping its franchises to reduce the sales volume and profitability is a knowing act, tortious in nature, designed ultimately to eliminate plaintiff as a franchisee.

Defendant knows that if it can deprive plaintiff of its profitable stores, plaintiff cannot afford to renew its franchises at the expiration of its term and has no economically viable alternative to selling to defendant, the only willing buyer under these circumstances. This amounts to an intentional deprivation of the benefit of the bargain and is contrary to the express public policy of the State of Indiana that a franchisor not compete unreasonably with its franchisee. It is also anticompetitive conduct tortious in nature. Defendant's intentional limiting of plaintiff's sales to defendant's "optimum" figure and its justification for that policy were never disclosed to plaintiff. The overlaps were unilaterally imposed on plaintiff. The fact and reasons for intentional overlapping were consistently denied by defendant's personnel up to and including testimony in the trial of this case by the persons who were involved in the decisions. The purported justification by defendant is basically that the franchisee gets a reasonable return on his investment, even if defendant does limit him to seventy-five thousand dollars ($75,000.00) annual sales. This is fallacious because not all stores attain that level. The average annual sales of plaintiff's stores is below fifty-seven thousand dollars ($57,000.00). Further, it requires seven (7) years to attain the seventy-five thousand dollar ($75,000.00) level and the franchisees can expect a loss for at least five (5) years of the ten (10) year term on defendant's assumptions. A successful seventy-five thousand dollars ($75,000.00) store produces only a modest annual return to the franchisee over the ten (10) year term. But even if all stores averaged seventy-five thousand dollars ($75,000.00) in sales, overlapping still deprives the franchisee of the very

substantial profit contemplated by both defendant and plaintiff if the concept proved successful, as it has. Defendant's retention of discounts from processors without disclosing these discounts to plaintiff in addition to being a breach of contract, amounts to nothing more or less than a commercial fraud. It was done for purposes of reducing plaintiff's profits as well as to obtain those amounts for defendant. Defendant is a large successful corporation with net income in its last fiscal year of approximately ten million dollars ($10,000,000.00). The four hundred thousand dollars ($400,000.00) in "special" discounts recently refunded to franchisees, as found herein, is relatively small in relation to defendant's income. On the facts of this case, punitive damages are appropriate.

On December 2, 1976, two (2) business days before this trial began, defendant advised plaintiff by telegram that it was voluntarily undertaking to perform pickup and delivery despite plaintiff's use of an independent print processor. Plaintiff already had a clear contractual commitment requiring defendant to perform this service. The same telegram announced a "voluntary" program of refunding discounts in excess of what the telegram called a "two (2) percent cash discount" and a "three (3) percent advertising allowance", which excess is termed "special discounts". These refunds were subsequently received by plaintiff in the form of "credit memos" in the amount of forty-one thousand four hundred eighty-four and fifty-three hundredths dollars ($41,484.53), which includes four thousand eighty-nine and sixty-five hundredths dollars ($4,089.65) interest. About the same time defendant refunded four hundred thousand dollars ($400,000.00) to other franchisees. On February 8, 1977, defendant made an

"offer" to buy plaintiff's business for four hundred eighty thousand dollars ($480,000.00) subject to the condition that the price be applied against damages for destruction of the business. During the trial of this case, in some instances from the stand, defendant's officers changed various previous positions after it was made clear that Fotomat's position was untenable. These include (1) undertaking to monitor overlapped store sales; (2) selling Fotomat film to Colorcraft for replacement of damaged film; (3) continuing cusomter service and chrome sales; (4) making processing liaison available to work with Colorcraft; and (5) agreeing to lease a kiosk (but refusing to sell) apart from a sublease of the ground. Plaintiff has been forced by defendant either to give up its rights or litigate at an expense that was enormous in relation to its net worth. Only on the eve of trial did defendant begin its string of concessions. Defendant's attempt to refund the wholly indefensible "special discounts" occurred only after it became apparent that plaintiff would not sell out at a modest price and would bring this action to trial.

Plaintiff has lost profits due to lost sales from March 31, 1974, to September 30, 1976, in the amount of one hundred twenty-four thousand three hundred five dollars ($124,305.00). Plaintiff has expended twenty-four thousand eight and seventy-eight hundredths dollars ($24,008.78) in out-of-pocket expenses of this lawsuit. Defendant has received a total of two hundred ten thousand three hundred thirteen and seventy-three hundredths dollars ($210,313.73) since October, 1968, in payments from plaintiff for film and processing in excess of the amounts paid by defendant for that film and processing, or during the joint venture period,

in excess of the applicable prevailing market price for print processing in the Indianapolis market. Of these damages seven thousand one hundred fifteen and seventy hundredths dollars ($7,115.70) represents two percent (2½) cash discounts from Eastman Kodak and Polaroid; two thousand nine hundred forty-eight and five hundredths dollars ($2,948.05) represent chrome processing discounts prior to June, 1971; and three thousand five hundred ninety-four and sixty-two hundredths dollars ($3,594.62) represent print processing discounts prior to May, 1970. The amount of prejudgment interest on such discounts and markup is fifty-five thousand eight hundred fifty-nine and two hundredths dollars ($55,859.02). Such amounts were fixed and readily ascertainable at the time of the contract breaches in accordance with fixed rules of evidence and accepted standards of evaluation. As a result of defendant's express contractual tie-in (1968 to 1971) and enforced policy of tie-in (1971 to date) with respect to print processing, and as a result of its agreement to use Carhart as a print processor, Plaintiff has paid defendant for print processing one hundred fifty-seven thousand seven hundred eighteen and forty-six hundredths dollars ($157,718.46) more than the price available to Photovest for such processing from other sources. Of these damages three thousand five hundred ninety-four and sixty-two hundredths dollars ($3,594.62) occurred prior to May of 1970, and an additional thirteen thousand six hundred sixty-six and fifty-four hundredths dollars ($13,666.54) occurred from May 1970, and through May 1971. Plaintiff has been charged royalties on sales at or below its cost in the amount of eleven thousand one hundred dollars ($11,100.00). Defendant failed to spend for

advertising three (3%) advertising contribution by plaintiff during the years 1970, 1971 and 1972, in the amount of twenty-four thousand eighty-nine dollars ($24,089.00). Plaintiff's business would have been worth five hundred thousand dollars ($500,000.00) as of September 30, 1976, but for defendant's unlawful acts. As a result of those acts, the business is now worthless and defendant is unable to sell to any willing buyer at any price. Plaintiff has incurred additional damages in the amount of twenty-four thousand three hundred nineteen and twenty-five hundredths dollars ($24,319.25) and eighty-one thousand three hundred sixty-eight dollars ($81,368.00) as found herein pertaining to stores IN-24 and IN-28 and the excessive rent.

The one hundred twenty (120) day contractual limitations period in the standard franchise agreement would, if enforceable, apply only to plaintiff's contract breach claims. However, due to defendant's concealment, plaintiff had no information as to chrome discounts and film markups and inaccurate information about the nature of its print discount claims prior to September, 1974. It had insufficient information to require it to bring its action. After the joint venture with Carhart in February, 1972, plaintiff had no knowledge of the financial arrangements with the joint venture or with Carhart in Indianapolis or other places. Further, until September, 1974, plaintiff had inaccurate information as to the dollar amount of its claims. In view of the franchise relation and the franchisee's dependence on the franchisor, it is unreasonable to enforce a very short limitation provision that would require even minor claims to be asserted, at least in the absence of a notice giving complete information to the franchisee.

Defendant never gave plaintiff any written or clear (or true) statement of the nature of its processor discounts or film markups. Under those circumstances defendant had a duty to disclose the full circumstances of its arrangements with suppliers before it can seek to invoke the one hundred twenty (120) day provision. It did not make that disclosure and is estopped from asserting the one hundred twenty (120) day provision. The contractual period is for less than one (1) year and purports to limit a contract for the sale of goods. Both film and print processing are "goods" for purposes of the Uniform Commercial Code. Defendant and plaintiff entered into a letter agreement in the year 1973, with respect to some disputed billings from defendant for goods allegedly furnished to plaintiff in the early days of the franchise. This agreement simply compromised disputed minor billing issues. Both defendant and plaintiff understood it had nothing to do with any of the issues in this case. Plaintiff never agreed to defendant's retention of discounts. Moreover, plaintiff's knowledge of the situation was insufficient to create any basis for waiver or estoppel or acquiescence or accord and satisfaction. Defendant suffered no prejudice by plaintiff's failure to bring this suit until December, 1974. In 1970, plaintiff, with other franchisees, brought an action against Eastman Kodak Co. for damages to the franchisees from the same acts defendant had complained of in the Fotomat-Kodak litigation as previously found. In 1973, that suit by plaintiff resulted in a payment of approximately eighty-eight thousand dollars ($88,000.00) to plaintiff of which half was spent in attorneys' fees and costs for a net recovery of forty-three thousand dollars ($43,-000.00). No part of the damages claimed in this case

has been compensated by any recovery in the Kodak settlement.

CONCLUSIONS OF LAW

The Court has jurisdiction of the parties and subject matter of the action. Title 28 U.S.C. Sections 1331(a), 1332(a) and 1337. Counts I and II of the complaint and the found facts each present claims under Section 4 of the Clayton Act (Title 15 U.S.C. Section 15) to recover treble the amount of damages incurred by plaintiff as a result of violations by defendant of Sections 1 and 2 of the Sherman Act (Title 15 U.S.C. Sections 1 and 2) and Section 3 of the Clayton Act (Title 15 U.S.C. Section 26) to secure equitable relief against those violations. The defendant was at all times in question licensed to do business, does and transacts business, has an agent, and was found in the geographic jurisdiction of the United States District Court for the Southern District of Indiana. The activities in violation of such statutes were and are being carried out in substantial part in such district. The amount involved in the issues of such Counts I and II exceeds the sum of ten thousand dollars ($10,000.00), exclusive of interest and costs. Counts III through VI and Counts IX and X of the complaint and the found facts each present claims that are not based on the laws of the United States of America and they are substantially the same as those giving rise to the claims in Counts I and II of the complaint and the Court has pendent jurisdiction.

The plaintiff has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count I of the amended complaint as supplemented. Defendant's securing of plaintiff's agreement to purchase print proc-

essing from defendant, by means of the franchise agreements, defendant's concealment of its discounts from processors, and its policies with respect to plaintiff's use of independent processors, constitutes an unlawful restraint of trade in violation of Section 1 of the Sherman Act, Title 15 U.S.C. Section 1 as charged in Count I of the complaint. Defendant has engaged since March, 1972, in an unlawful combination and conspiracy with its wholly owned subsidiary, Fotomat Labs, Inc., designed to eliminate plaintiff as a retail competitor of defendant and as an independent purchaser of photo processing in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, as charged in Count I of the complaint. Plaintiff has been injured in its business as charged in Count I of the complaint and as found in the amount of one hundred fifty-seven thousand seven hundred eighteen and forty-six hundredths dollars ($157,718.46) from such restraint of trade and nine hundred twenty thousand seven hundred eighty-five and six hundredths dollars ($920,-785.06) from such unlawful combination and conspiracy to eliminate plaintiff as a retail competitor of defendant and as an independent purchaser of photo processing.

The plaintiff has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count II of the amended complaint as supplemented. Defendant has engaged in an unlawful attempt to monopolize the drive-thru retail photo processing submarket in the Indianapolis metropolitan area in violation of Section 2 of the Sherman Act, Title 15 U.S.C. Section 2, as charged in Count II of the complaint. Plaintiff has been injured in its business as charged in Count

II of the complaint and as found in the amount of nine hundred sixty thousand eight hundred fifty-one and ninety-five hundredths dollars ($960,851.95) from such unlawful attempt to monopolize the drive-thru retail photo processing submarket in the Indianapolis metropolitan area.

The plaintiff has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count III of the amended complaint as supplemented. Defendant's securing of plaintiff's agreement to purchase print processing from defendant, by means of the franchise agreements, defendant's concealment of its discounts from processors, and its policies with respect to plaintiff's use of independent processors, constitutes an unlawful restraint of trade in violation of Indiana Code 24-1-2-1 as charged in Count III of the complaint. Defendant has engaged since March, 1972, in an unlawful combination and conspiracy with its wholly owned subsidiary, Fotomat Labs, Inc., designed to eliminate plaintiff as a retail competitor of defendant and as an independent purchaser of photo processing, and defendant in addition has engaged in an unlawful scheme and design having the same purposes since at least June, 1971, in violation of Indiana Code 24-1-2-1 as charged in Count III of the complaint. Defendant's contractual requirement that plaintiff lease defendant's merchandising islands from it constitutes an unreasonable restraint of trade or commerce in violation of Indiana Code 24-1-2-1 as charged in Count III of the complaint. Plaintiff has been injured in its business as charged in Count III of the complaint and as found in the amount of one hundred fifty-seven thousand seven hundred eighteen and forty-six hun-

dredths dollars ($157,718.46) for such restraint of trade; nine hundred twenty thousand seven hundred eighty-five and six hundredths dollars ($920,785.06) from such unlawful combination and conspiracy to eliminate plaintiff as a retail competitor of defendant and as an independent purchaser of photo processing; an additional forty thousand sixty-six and eighty-nine hundredths dollars ($40,066.89) from such unlawful scheme and design for such purposes between at least June, 1971 and March, 1972; and eighty-one thousand three hundred sixty-eight dollars ($81,368.00) from such unreasonable restraint of trade requirement that plaintiff lease from defendant.

The plaintiff has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count IV of the amended complaint as supplemented. Defendant has engaged in an unlawful attempt to monopolize the drive-thru retail photo processing submarket in the Indianapolis metropolitan area in violation of Indiana Code 24-1-2-2 as charged in Count IV of the complaint. Plaintiff has been injured in its business as charged in Count IV of the complaint and as found in the amount of nine hundred sixty thousand eight hundred fifty-one and ninety-five hundredths dollars ($960,-851.95) from such unlawful attempt to monopolize the drive-thru retail photo processing submarket in the Indianapolis metropolitan area.

The plaintiff has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count V of the amended complaint as supplemented. The master franchise agreement and all subsequent franchise and lease agreements between plaintiff and defendant

are governed by California law except that the question of the validity of the four (4) month limitations period contained in the agreements is governed by the law of Indiana. The Court construes the contract's provision that defendant sell film and film processing to plaintiff at "Fotomat's cost without any markup whatsoever" to obligate defendant to resell those products and services at the exact price in dollars paid by defendant to the supplier. In other words, defendant is obligated under the agreement to pass through to plaintiff all discounts which it receives from its film and processing suppliers, and for whatever reason. Similarly, defendant may not mark up the price it pays for film in reselling that film to plaintiff, regardless of the reason for the markup. The Court's conclusion is based on the following factors: (a) It is clear from the agreements themselves, from the various sales materials used by defendant, and from the testimony at trial, that defendant was to be compensated for handling and other overhead items, and was to derive its profits, from plaintiff's royalty payments. The promise to sell "at cost without any markup whatsoever" was an inseparable part of an arrangement that called upon plaintiff to pay a total of three hundred fifteen thousand dollars ($315,-000.00) in initial fees and even larger amounts in continuing royalties. The "pass through" of defendant's "buying power" was one of the main considerations in the purchase and sale of the franchises; (b) Words in an agreement should be interpreted in their ordinary and popular sense. The phrase "cost without any markup whatsoever" in this context means the exact price paid by the seller. Under all of the circumstances found in evidence the agreement is interpreted according to its plain meaning; (c) Defendant's processing dis-

counts since at least May, 1970, have been nothing more nor less than volume discounts—exactly the type of cost savings which the parties intended would be passed through to plaintiff; (d) Defendant has failed to prove any significant distinction between Kodak film, which was and is resold without a markup for handling, warehousing, etc., and Fotomat brand film, which has been marked up. Thus, the fact that defendant brand film was not contemplated in 1968 is without legal significance. The price of Kodak film was readily ascertainable to its franchisees, whereas only defendant knew the cost of defendant film. The Court concludes that defendant knew it could not properly mark up defendant brand film in its charges to the franchisees but hoped to get away with it because it was done in secret; and (e) The construction of the agreement is resolved against the defendant, the drafter of the agreement. During the period in which the defendant-Carhart joint venture performed plaintiff's print processing, the price of plaintiff's print processing purchased from defendant was governed by the rider to the master franchise agreement. The rider required defendant to charge plaintiff prices "comparable to or less than those prevailing in the industry in [plaintiff's] general market area." The Court construes the rider provision to require defendant to sell at the prevailing price for Fotomat-type work, *i.e.*, for large volume customers which perform their own pickup and delivery and other ancillary services. The parties clearly intended that plaintiff would do no worse than before, and possibly better, should defendant enter the market. Under paragraph F-9.1 of the franchise agreements, defendant's cost savings attributable to its "buying power" were to be passed through to plaintiff. When defendant

entered the processing business via the Carhart joint venture in 1972, it began to obtain additional cost savings representing the profits previously earned by the independent processors. Under the rider provision, it was not required to charge plaintiff its new "cost." Rather, it was to charge prices comparable to or below the "prevailing market price." The intentions of the parties clearly were that defendant might or might not pass some of those new cost savings on to its franchisee. They did not intend that defendant could raise its price to plaintiff above the level established in the "cost without markup" provision. If the "prevailing market price" were to be regarded as the price received by a discount store or a drugstore, as here advocated by defendant, that is exactly what would result: a price increase to the franchisee. Plaintiff would lose defendant's buying power by reason of the fact that defendant had become more efficient, not less, as a supplier of processing. Accordingly, the Court construes "prevailing market price" in the rider to the franchise agreement to mean the prevailing price for Fotomat-type work, which would mean in most cases the price which defendant could then obtain from independent processors in that market if it were not performing the processing for itself. Defendant has breached paragraph F-9.1 of the franchise agreement by its retention of discounts and markups with respect to film and processing purchased from others and resold to plaintiff. Defendant also has breached the agreement's requirement, applicable during the joint venture period, that it sell print processing to plaintiff at prices comparable to or less than those prevailing in plaintiff's general market area. Plaintiff has been damaged by the breaches in the amount of two hundred ten thousand

three hundred thirteen and seventy-three hundredths dollars ($210,313.73). The Court construes paragraph F-9.6 of the franchise agreements to require defendant to perform general services for plaintiff as performed during the period 1968 to 1972, with due regard to necessary changes in operations which do not discriminate against the franchisee or impair the value of its franchise. It is inappropriate for the Court to set forth in detail the specific services and their frequency which are called for by the agreement's general language. It is absolutely clear from this record that defendant has breached both the letter and spirit of paragraph F-9.6 on frequent occasions since 1973. These breaches include, without limitation, the reduction in the number of daily film pickups, the virtual elimination of visits to franchise stores by the defendant area manager, the reduction in the frequency of employee meetings, the exclusion of plaintiff's employees from sales incentive programs, and the withdrawal of processing liaison service from plaintiff's print processor. Plaintiff's damages for these particular breaches are impossible to quantify. They are undoubtedly a factor in the destruction of plaintiff's business and in plaintiff's lost profits. California law implies into every contract a covenant of good faith and fair dealing by each party, and a duty by each party to do nothing to destroy the right of the other party to enjoy the fruits of the contract. This implied covenant imposes upon the parties the duty not only to refrain from rendering performance of the contract impossible, but also to do everything that the contract presupposes they will do to accomplish its purposes. Under California law defendant cannot act so as to make profitable operation of the franchise impossible, or so as to coerce

franchise owners to terminate their agreements on terms favorable to defendant. The Court also concludes that having sold franchises to plaintiff on the understanding of all parties that sales levels of ninety thousand dollars ($90,000.00) were merely "satisfactory" and that substantially greater sales were entirely possible, and having represented that it "could not afford to overlap" plaintiff's marketing area, defendant cannot under California law intentionally act in a manner to frustrate plaintiff's attainment of sales levels in its stores consistent with those understandings. Defendant has breached the implied covenant of good faith and fair dealing in its agreements with plaintiff by: (a) its saturation of the Marion County market area with company-owned stores, including the placement of numerous company stores in the market areas of franchised stores as found; (b) its refusal to relocate losing plaintiff's stores and its imposition of onerous terms upon relocations; (c) its reduction in services to plaintiff, and its efforts to transfer expenses to the franchisee as found; (d) its efforts to prevent plaintiff from changing print processors and thereby obtain better processing at lower cost as found; (e) forcing plaintiff to bring this action to obtain rights it clearly has as found; and (f) its efforts through all of the above to destroy plaintiff's business and to recover the franchise for itself as found. Plaintiff has been damaged by defendant's breach of the implied covenant of good faith and fair dealing in the amount of six hundred seventy-two thousand six hundred thirty-three and three hundredths dollars ($672,633.03). In light of defendant's 1971 waiver of its right to fix plaintiff's retail prices, paragraph F-4.5 of the franchise agreements should be interpreted to exempt from advertising and royalty

fees retail sales at prices at or below plaintiff's cost, where such sales are pursuant to a sales promotion initiated by defendant. Beginning in 1971, defendant has breached paragraph F-4.5 of the franchise agreements by charging and receiving royalty and advertising fees on retail sales at or below plaintiff's cost, pursuant to sales promotions initiated by defendant. Plaintiff has been damaged by such breach in the amount of eleven thousand one hundred dollars ($11,100.00). The Court construes paragraph F-4.3 of the franchise agreements to require defendant to spend for advertising, public relations and franchise promotion annually an amount equal to the three percent (3%) advertising contribution paid by plaintiff in that year. Such amounts are required to be spent in the local market or, if spent nationally, in a manner such that the expenditure benefits pro rata the local market. By implication, to the extent company-owned stores are present in the local market, the amount of advertising is required to be proportionately increased. The defendant has not made proper allocation of national advertising as found. In calendar years 1970, 1971 and 1972, defendant breached paragraph F-4.3 of the franchise agreements by failing to expend plaintiff's three percent (3%) advertising contribution as required. Plaintiff has been damaged by the breach in the amount of twenty-four thousand eighty-nine dollars ($24,089.00). Plaintiff has failed to prove the claimed breach by defendant of the first right of refusal on any additional stores sold in Marion County, Indiana. Defendant never offered to sell a franchise to anyone. Defendant's construction and operation of a company store in and of itself did not violate such provision of the agreement and did not establish bad faith and monopolistic intent

in and of itself. Plaintiff is not entitled to any damages for this alleged breach. Plaintiff is entitled to recover prejudgment interest on its damages for breach of paragraph F-9.1 and the rider provision at the rate of six percent (6%) per annum to October 1, 1971, and at the rate of eight percent (8%) per annum thereafter to date of judgment. Plaintiff has proved prejudgment interest in the amount of fifty-five thousand eight hundred fifty-nine and two hundredths dollars ($55,859.02) to December 1, 1976. Plaintiff also is entitled to additional prejudgment interest on these amounts at the rate of eight percent (8%) per annum from December 1 to the date of judgment.

The plaintiff has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count VI of the amended complaint as supplemented. Defendant's representations to plaintiff since May, 1970, as found, concerning the nature and amount of its processor discounts constitute actionable fraud under both Indiana and California law. Plaintiff has been damaged by the fraud in the amount of one hundred fifty-four thousand one hundred twenty-four and forty-six hundredths dollars ($154,124.46). Plaintiff is entitled to prejudgment interest on its damages at the rate of six percent (6%) per annum to October 1, 1971, and eight percent (8%) per annum thereafter. Plaintiff has proved prejudgment interest in the amount of forty-six thousand sixty-six and seventeen hundredths dollars ($46,066.17) to December 1, 1976, and is entitled to additional prejudgment interest at the rate of eight percent (8%) per annum from December 1, 1976, to the date of judgment. Defendant has committed fraud constituting intentionally oppressive conduct for

which punitive damages are appropriate. Plaintiff should recover punitive damages for fraud in the amount of one hundred fifty-four thousand one hundred twenty-four and forty-six hundredths dollars ($154,124.46).

The plaintiff has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count IX of the amended complaint as supplemented. Count IX of the amended complaint alleges a tort and is governed by the law of the State of Indiana. Defendant's multiple breaches of its contract with Photovest constitute under Indiana law an oppressive, intentional, tortious wrong for which punitive damages should be awarded. The Court would reach the same conclusion under California law. The Court further concludes that an award of punitive damages would be in the public interest. The Court concludes that defendant's breach of paragraph F-4.3 of the agreements was not tortious. The other contract breaches found above were tortious and each constitutes a basis for actual and punitive damages. Plaintiff has been damaged by the tort in the amount of eight hundred ninety-four thousand forty-six and seventy-six hundredths dollars ($894,046.76). and should recover in addition thereto the sum of eight hundred ninety-four thousand forty-six and seventy-six hundredths dollars ($894,046.76) as punitive damages. Plaintiff is entitled to prejudgment interest on its damages from defendant's tortious breaches of paragraph F-9.1 and the rider provision of the franchise agreement in the amount of fifty-five thousand eight hundred fifty-nine and two hundredths dollars ($55,-859.02) to December 1, 1976, and thereafter at the rate of eight percent (8%) per annum until the date of judgment.

The plaintiff has not maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count X of the amended complaint as supplemented. Defendant's wrongful withholding of discounts does not come within the literal application of Indiana Code 35-17-5-4, which is a criminal statute. The Court also notes that the private right of action asserted in Count X and created in Indiana Code 35-17-5-12(7) has been repealed by the Indiana legislature. Accordingly, Photovest is denied relief under Count X of the complaint.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the second defenses of answer to Counts I through VI and IX of the amended complaint as supplemented. The California litigation forum clause in the contracts between the parties was the subject of pretrial consideration. That provision in the contracts is not binding or enforceable upon the parties for the causes of action stated in Counts I through IV of the amended complaint as supplemented. Having jurisdiction as found and proper venue over such causes of action as found renders the contract provisions inapplicable to the pendent causes of action stated in Counts V, VI and IX.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the third defenses of answer to Counts I and II of the amended complaint as supplemented, except that defendant has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the third defense of answer to Count I of the amended

complaint as supplemented insofar as plaintiff in Count I seeks to recover from defendant the two percent (2%) print discount received by defendant prior to May 20, 1970. Such damages under Count I are barred by the four (4) year statute of limitations. Title 15 U.S.C. Section 15b. There is no evidence of concealment of such discount. Plaintiff's print processing damages otherwise recoverable under Count I should be reduced by the amount of three thousand five hundred ninety-four and sixty-two hundredths ($3,594.62). Such statute is also applicable to Count II. Print discount damages incurred between May, 1970, and December 20, 1970, under Count I are recoverable due to the defendant's found fraudulent concealment of the nature of the five percent (5%) discount it began to receive in May, 1970, and the ten percent (10%) discount which was available beginning June, 1971.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential elements and the alleged facts of the third defenses of answer to Counts III and IV of the amended complaint as supplemented, except, the defendant has maintained its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the third defense of answer to Count III of the amended complaint as supplemented insofar as plaintiff in Count III seeks to recover from defendant the two percent (2%) print discount received by defendant prior to May 20, 1970. Such damages under Count III are barred by the two year statute of limitations. Indiana Code 34-1-2-2. There is no evidence of concealment of such discount. Plaintiff's print processing damages otherwise recoverable under Count III should be reduced by the amount

of three thousand five hundred ninety-four and sixty-two hundredths dollars ($3,594.62). Such statute is also applicable to Count IV. Print discount damages incurred by plaintiff between May, 1970, and December 20, 1972, under Count III are recoverable due to defendant's found fraudulent concealment of the nature of the five percent (5%) discount it began to receive in May, 1970, and the ten percent (10%) discount which was available beginning June, 1971. Similarly, discount and markup damages between June, 1971, and December 20, 1972, are recoverable under plaintiff's state monopolization claim in Count IV, by reason of the found defendant's fraudulent concealment.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the third defense of answer to Counts V, VI, and IX of the amended complaint as supplemented. Under the found facts and circumstances of this case the one hundred twenty (120) day limitation of actions period fixed in paragraph F-11.16 of the franchise agreement is unenforceable as the actions stated in Counts V, VI, and IX of the amended complaint as supplemented. The contract provision is unreasonable and hence unenforceable. The contract did not provide for plaintiff to receive copies of records and plaintiff did not otherwise obtain information to determine its rights in time to apply such a short limitation of action period. Also, the Uniform Commercial Code, Indiana Code 26-1-2-725(1), is applicable to the franchise agreement and voids the contracted one hundred twenty (120) day limitations of action period. It prohibits contractual limitations periods of less than one (1) year in the contracts for the sale of goods. The

found facts are that film, and print, processing are goods within the meaning of such statute. Also, the found facts of defendant's active concealment of the facts of plaintiff's claims tolls such contracted limitation of action period. The California Code of Civil Procedure, Section 337 (West, 1976 Supp.), does not bar plaintiff's action stated in Count V. The provisions of Indiana Code 34-1-2-2 (Sixth) are applicable to the action stated in Count V. The action stated in Count V was timely brought within twenty (20) years of its accrual. The California Code of Civil Procedure, Section 338(4) (West, 1976 Supp.), does not bar plaintiff's action stated in Count VI. The provisions of Indiana Code 34-1-2-1 (Fourth) are applicable to the action stated in Count VI. The action stated in Count VI was timely brought within six (6) years of its accrual. The California Code of Civil Procedure, Section 339(1) (West, 1976 Supp.), does not bar plaintiff's action stated in Count IX. The provisions of Indiana Code 34-1-2-3 are applicable to the action stated in Count IX. The action stated in Count IX was timely brought within fifteen (15) years of its accrual.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the fourth defenses of answer to Counts I and III of the amended complaint as supplemented. It is recognized that defendant had the right to maintain a standard of quality by its franchisees to preserve and protect its valuable trademark and service mark. The found facts, however, establish plaintiff's claims against defendant under Counts I and III and this partial defense in no way diminishes such plaintiff's claims and damages.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the fourth defenses of answer to Counts V, VI, and IX of the amended complaint as supplemented. The found facts disclose among other things that the ultimate alleged facts of this defense are not true. The findings disclose among other things a lack of adequate knowledge of defendant's alleged misconduct referred to in Counts V, VI, and IX, and defendant's active intentional concealing of pertinent facts from plaintiff in the execution of the contracts between the parties. I find no support for this defense claim of ratification or acquiescence by plaintiff of defendant's misconduct alleged in Counts V, VI, and IX, within the meaning of California Code of Civil Procedure, Section 3516 (West, 1970), or under the common law. I find no support for this defense claim that the plaintiff waived or should be estopped from making the claims alleged in Counts V, VI, and IX, within the meaning of California Code of Civil Procedure, Section 1501 (West, 1954), and Section 2076 (West, 1955), or under the common law.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the fifth defenses of answer to Counts V and VI of the amended complaint as supplemented. The found facts support plaintiff's due diligence under all of the circumstances in the prosecution of the equitable relief claimed in Counts V and VI and I find no support for the laches defense. The found facts also disclose active concealment and deception on defendant's part which thwarted a more timely action by plaintiff.

The defendant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of the sixth defense of answer to Count V of the amended complaint as supplemented. The found facts support plaintiff's lack of knowledge of the breaches of contract which arose from the purchase of merchandise and processing services on January 26, 1973, and which breaches are now the subject of the action stated in Count V. The found facts disclose active concealment and deception on defendant's part to prevent plaintiff from obtaining knowledge of its claims on and prior to January 26, 1973. I find no support for this defense.

The counterclaimant has failed to maintain its burden of proof by a preponderance of the evidence of all of the essential legal elements and the alleged facts of Count V of the amended counterclaim. The attorneys' fee provision of such contract is no basis for an award to defendant of such expense. The contracts were related and plaintiff brought this action charging tortious misconduct of defendant and breaches of the contracts by defendant. The plaintiff has prevailed in this judgment as to all of such claims except the one claimed breach of plaintiff's alleged right to all stores built by defendant in the Indianapolis market. Plaintiff having prevailed in this action precludes the defendant of the right to recover such expenses under the found facts and circumstances of this case. The issue of the right of refusal provision of the master contract was not the backbone or dominant issue of the plaintiff's action or defendant's defense. Such issue did not alone precipitate or prolong the expense of the litigation. The plaintiff in its trial briefs and during the trial

made no attempt to recover damages for such alleged breach but sought to maintain such conduct as a breach as evidence of defendant's bad faith. The plaintiff failed to prove such a construction of the contract but the plaintiff is the prevailing party as to the other issues that were defensed and caused such expense.

Plaintiff is entitled to recover threefold its actual damages sustained by reason of defendant's violations of Sections 1 and 2 of the Sherman Act, Title 15 U.S.C. Sections 1 and 2, and of Indiana Code 24-1-2-1 and 24-1-2-2. Plaintiff is entitled to recover its attorneys' fees and costs under the Sherman Act, Title 15 U.S.C. Section 15, and under Indiana Code 24-1-2-7. Plaintiff also has substantially prevailed on its claim for injunctive relief under Title 15, U.S.C. Section 26, and is entitled to a reasonable attorneys' fee under that section. The Court construes the master franchise agreement to allow attorneys' fees for the successful prosecution of claims for breach of any of the provisions of that agreement, including the provisions of the attached standard franchise and standard lease agreements. The standard agreements were expressly incorporated into the master agreement and their provisions are pertinent to plaintiff's obligation to buy, and defendant's obligation to sell, fifteen (15) "franchises." The attorneys' fee provision also applies to defendant's breach of the implied covenant of good faith and fair dealing. The matter of attorneys' fee, costs and sanctions should be set for a separate hearing.

Plaintiff is entitled to damages under Counts I, II, III, IV, V, VI, and IX of the amended complaint as supplemented. Plaintiff also is entitled to an injunction under Counts I, II, III, IV and V, to restrain Fotomat from cutting off pickup and delivery, chrome

processing and customer service to plaintiff. Plaintiff is not entitled to relief on Count X. The award of damages under plaintiff's various theories is to some extent duplicative. All of plaintiff's recoverable damages for restraints of trade under Counts I and III are also recoverable under Counts I, II, III or IV, except for print processing damages during the period May, 1970, through May, 1971, in the amount of thirteen thousand six hundred sixty-six and fifty-four hundredths dollars ($13,666.54). That amount trebled is forty thousand nine hundred ninety-nine and sixty-two hundredths dollars ($40,999.62). All of plaintiff's actual damages for contract breach under Count V, for fraud under Count VI, and for tortious breach of contract under Count IX, are also recoverable under Counts II and IV except for: (1) discounts on Kodak and Polaroid film in the amount of seven thousand one hundred fifteen and seventy hundredths dollars ($7,115.70); (2) chrome discounts prior to June, 1971, in the amount of two thousand nine hundred forty-eight and five hundredths dollars ($2,948.05); (3) print discounts prior to May, 1970, in the amount of three thousand five hundred ninety-four and sixty-two hundredths dollars ($3,594.62); (4) advertising contributions in the amount of twenty-four thousand eighty-nine dollars ($24,089.00); and (5) prejudgment interest to December 1, 1976, in the amount of fifty-five thousand eight hundred fifty-nine and two hundredths dollars ($55,859.02) and thereafter at the rate of eight percent (8%) until the date of this judgment.

Those five additional amounts total ninety-three thousand six hundred six and thirty-nine hundredths dollars ($93,606.39). Actual damages recoverable under Counts II and IV are nine hundred sixty thousand eight hundred fifty-one and ninety-five hundredths dollars ($960,851.95). That amount trebled is two million eight hundred eighty-two thousand five hundred fifty-five and eighty-five hundredths dollars ($2,882,-555.85). Without any duplication, plaintiff's total actual and trebled damages are three million seventeen thousand one hundred sixty-one and eighty-six hundredths dollars ($3,017,161.86). The tortious activity upon which the Court bases its findings and conclusions that punitive damages of Count IX and Count VI are appropriate is in large part included in the activity upon which the Court bases its conclusion of Indiana antitrust violations. Because the Court holds that defendant has violated Indiana Code 24-1-2-1 and 24-1-2-2, which are Indiana criminal statutes, plaintiff may not under Indiana law recover the punitive damages to which it would otherwise be entitled for activity by defendant which violates those criminal statutes. The Court, therefore, concludes that plaintiff should recover only the sum of three million seventeen thousand one hundred sixty-one and eighty-six hundredths dollars ($3,017,161.86), plus prejudgment interest allowable under Counts V, VI, and IX at eight percent (8%) from December 1, 1976, to the date of this judgment. Defendant is allowed a setoff against that sum in the amount of forty-one thousand four hundred eighty-

four and fifty-three hundredths dollars ($41,484.53), equaling the amount already paid to plaintiff by means of the credit memos issued during trial. Plaintiff's total recovery is therefore two million nine hundred seventy-five thousand six hundred seventy-seven and thirty-three hundredths dollars ($2,975,677.33), plus the prejudgment interest referred to above.

Dated this 18 day of May, 1977.

/s/ Cale J. Holder
Cale J. Holder, Judge, United States District Court Southern District of Indiana

Judgment.

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) The plaintiff recover of the defendant the sum of two million nine hundred seventy-five thousand six hundred seventy-seven and thirty-three hundredths dollars ($2,975,677.33), plus prejudgment interest from December 1, 1976, to the date of this judgment at the rate of eight percent (8%) per annum on the principal amount of two hundred ten thousand three hundred thirteen and seventy-three hundredths dollars ($210,313.73), plus interest from the date of this judgment to time of payment thereof at the rate of eight percent (8%) per annum as to the entire amount of recovery, plus costs and a reasonable attorneys' fee to be determined after hearing to be scheduled by further order of the Court together with hearings on all pending motions if the parties are unable to compromise such fees and issues.

(2) The defendant is enjoined and restrained from discontinuing pickup and delivery service, customer service, or sales of chrome processing to plaintiff or its successor or assignee without prior written consent of plaintiff or its successor or assignee as long as plaintiff or its successor or assignee continues to operate any Fotomat merchandising islands in Marion County, Indiana, under franchise agreement with defendant.

(3) Defendant's counterclaim is dismissed on the merits.

Dated this 18 day of May, 1977.

/s/ Cale J. Holder
Cale J. Holder, Judge, United States District Court Southern District of Indiana

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 24, 1979
Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HOWARD T. MARKEY, Chief Judge*
Hon. HARLINGTON WOOD, JR., Circuit Judge

Nos. 77-1741 & 77-1742

PHOTOVEST CORPORATION, an Indiana corporation,
Plaintiff-Appellee, Cross-Appellant,

vs.

FOTOMAT CORPORATION, a Delaware corporation,
Defendant-Appellant, Cross-Appellee.

Appeal From the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 74-705-C—**Cale J. Holder,** *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for proceedings consistent with this opinion, in accordance with the opinion of this court filed this date. Costs are assessed against the defendant.

*Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals is sitting by designation.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 25, 1979
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HOWARD T. MARKEY, Chief Judge*
Hon. HARLINGTON WOOD, JR., Chief Judge

Nos. 77-1741 & 77-1742

PHOTOVEST CORPORATION, an Indiana corporation,
Plaintiff-Appellee, Cross-Appellant,

vs.

FOTOMAT CORPORATION, a Delaware corporation,
Defendant-Appellant, Cross-Appellee.

Appeal From the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 74-705-C—**Cale J. Holder,** *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Fotomat Corporation, defendant-appellant and cross-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

*Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals is sitting by designation.

Supreme Court, U. S.
FILED
FEB 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1137

FOTOMAT CORPORATION,

Petitioner,

v.

PHOTOVEST CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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No. 79-1137

FOTOMAT CORPORATION,

Petitioner,

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PHOTOVEST CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Photovest Corporation respectfully requests that this Court deny the petition for writ of certiorari.

QUESTIONS PRESENTED

1. Was there error in the manner in which the district court handled a misunderstanding that surfaced on the

eve of trial regarding the timing of exchange of trial briefs?

2. Did petitioner (a) create the issue by its own misunderstanding or (b) waive the issue or (c) fail to make timely objection or (d) fail to show any prejudice from a nine-day delay in receipt of respondent's brief?

STATEMENT OF THE CASE

Introduction

In accordance with longstanding practice in the Southern District of Indiana, the pretrial order in this case, and the district court's local rules, respondent ("Photovest") submitted its trial brief to the district court but did not immediately serve a copy on petitioner ("Fotomat"). It did serve the brief on the tenth day of the thirty-one day bench trial, when it first became clear that Fotomat intended to make an issue of the point. The question is whether the few days' delay in service of Photovest's trial brief, under the unique circumstances in this case, constitutes error at all, and if so is it reversible error. The Court of Appeals, affirming the district court, held that it was neither.

The Holdings Below On The Merits

On the merits of Photovest's eight count complaint the district court held for Photovest on six counts, for Fotomat on one, and partly for each on one. App. 131a-143a. It ruled that Fotomat (a) violated the antitrust laws, and (b) was liable for contract breaches and fraud both warranting substantial punitive damages. No specific fact finding was challenged on appeal.[1] The Court of Appeals unanimously

[1] Fotomat did urge the Court of Appeals to "strictly scrutinize" *all* of the findings because they in part represented findings proposed by Photovest and allegedly were inconsistent in some respects, notably with regard to damages. Appellant's Opening Brief, pp. 22-31. In response the Court of Appeals "critically reviewed" the findings (App. 58a) and concluded, correctly, that there were no inconsistencies (*Id.*).

affirmed the bulk of the antitrust judgment after a detailed review of the record.[2] State law contract and fraud doctrines also support three-fourths of the judgment. As for Fotomat's claim that it had dealt fairly and in good faith with Photovest, the Court of Appeals tersely held: "We have reviewed the record in this regard and must flatly disagree." App. 53a.

The Procedural "Issue" Below

The abstract procedural issue Fotomat seeks to raise has no substance when the facts are examined. Rule 5(a) of the Federal Rules of Civil Procedure omits "briefs" from an extensive list of items required to be served. And, as the Court of Appeals observed, "the rule does not address the timing of the service." App. 7a. In both respects the rules for trial courts are different from those governing briefs in the courts of appeals and in this Court. Those require immediate service of "all papers" and "briefs," respectively. Fed.R.App.P. 25(b); Sup. Ct. Rule 41(7). A "trial brief" is typically filed with the court shortly before trial to alert the court to parties' contentions and the expected evidence. Where pretrial service is not required, the trial brief may also candidly seek to alert the court to how a party proposes to try the case, including

[2] Fotomat suggests that the antitrust law aspects of the decision are questionable (Pet., p. 13, n. 13). But the current service to one leading treatise summarized the antitrust holdings of the Court of Appeals as follows:

> "The case is almost a textbook review of the criteria for establishing a relevant market, attempted monopolization in violation of Sherman Act Section 2 and illegal tying in violation of Sherman Act Section 1, as well as an exposition of the clearly predatory use of economic power."

Von Kalinowski, *Antitrust Report* 9 (Nov. 1979).

inconsistencies that it hopes to develop in the testimony of adverse witnesses. Photovest's trial brief was of this type.

It is well settled that the practice of exchanging or not exchanging trial briefs prior to trial varies from court to court and that local rules must be consulted:

> "Some trial courts have rules requiring the service of a copy of the trial brief upon counsel for the other side. Local rules and statutes must be consulted in this regard. If there is no court rule covering the subject, it may be discretionary with the presiding judge to decide whether or not to direct that a copy be served on opposing counsel."

The Trial Brief, 5 Am. Jur. Trials 89, 92 (1966).[3] In the Southern District of Indiana the published local rule[4] and longstanding practice[5] have been *not* to exchange until the conclusion of trial. In bench trials, the exchange occurs before post-trial briefing and decision. Fotomat, whose local counsel were familiar with the rule (X Tr. 1697) but whose chief trial counsel were not (*see* note 6, *infra*), for the first time questioned delayed service on the afternoon

[3] *See also,* Zammit, *The Trial Brief And The Trial Memorandum,* 24 Prac. Law. 73, 80 (1978), for the proposition that service of trial briefs is a matter for local rule or practice. The local district rules listed in footnote 4 to the Court of Appeals opinion (App. 7a) appear to permit delayed exchange. Many others expressly require "service" (*see, e.g.,* S.D. Cal. Rule 12) and many are silent on this point. State rules also vary. *Compare* Indiana Trial Rule 5 *with* Massachusetts Rule 5, both of which are patterned after the Federal Rules of Civil Procedure. Indiana expressly provides "except trial briefs" and Massachusetts expressly adds "briefs" to the list of items to be served under Rule 5.

[4] Local Rule 19(k) provides for *submission* of trial briefs, jury instructions and proposed findings, but requires *service* only of jury instructions. Rule 19(k), S.D. Ind. The full text of the rule is set forth in footnote 2 of the Court of Appeals opinion, App. 5a.

[5] Ind. State Bar Ass'n, *Federal Court Pleading & Practice* 266 (1960); XI Tr. 1719, 1722.

of the last business day before trial (Tr. 209), the date the pretrial order called for briefs of both sides to be due. That was after Photovest's brief had been prepared and submitted earlier that day on the assumption the pretrial order and the rule and practice in the district would be followed. R. 2288-96. The misunderstanding by Fotomat as to the ground rules in the district was attributable to—if not caused by—Fotomat.[6] The brief contained no legal theory that was not developed in the pleadings and massive discovery. Nor were there factual surprises.[7]

[6] Fotomat was represented by two firms, one which did—and one which did not—regularly practice in the Southern District of Indiana. The first was—and the second was not—familiar with the local rule and practice (until changed by the Court of Appeals in this case) not to exchange trial briefs until the end of trial. Fotomat elected to use the second firm as its chief trial counsel. In the hearing on this matter conducted on trial day ten, Fotomat's counsel reported a failure of communication among Fotomat's own counsel on this point. Acknowledging that Fotomat's local counsel had informed its chief trial counsel of the nonexchange rule as early as March, 1975 (almost two years before trial), Fotomat's attorney stated:

> "I think that is probably the root of the misunderstanding, because when he told me that—when our local counsel told me that and when I discussed that, I think with [Photovest's attorney], it was my understanding that when you say 'trial briefs aren't exchanged' that there simply weren't trial briefs: didn't bring them in, exchange them, and didn't give them to the Judge either." XI Tr. 1706.

Fotomat of course has the right to utilize counsel of its choice. But that election does not give it any more or fewer rights that it would otherwise have.

[7] Photovest's basic charges and detailed lists of evidence supporting them were set forth in voluminous answers to interrogatories, many of which asked Photovest to "State each fact upon which you base" the separate allegations of the 23-page complaint. The "personal attacks" to which Fotomat refers are apparently the contention that Fotomat in essence misled its own attorneys as well as Photovest. This identical contention was in pretrial summary judgment briefing (R. 1401, pp. 8-9, 26-27) as well as the opening statement (Tr. 229-230). For example, the position that was described as "indefensible" at page 98 of the trial brief (Pet., p. 12, n.11) was described as "baseless" in Photovest's interrogatory

When denied immediate access to Photovest's complete brief, Fotomat then promptly submitted *but did not serve* a second brief of its own attacking the credibility of Photovest's principal witness who had not yet begun his testimony. Tr. 215; R. 1794, 1973. Photovest agreed to serve an edited version of its brief (Tr. 213-4) and assumed that was the end of the matter when that was done on day nine (R. 2297-98, 2300). No further objection was voiced until near the end of a two-month recess that occurred between day nine and day ten. Then, before the tenth day (but after it had conducted five days of cross-examination of Photovest's principal witness with its own unserved brief before the court), Fotomat finally served its second brief and filed a motion for a mistrial. R. 2300, 1967. Fotomat also served a 290-page brief that was, in effect, an answer to Photovest's initial brief. R. 2008. At that point, none of Fotomat's witnesses had yet testified.

At the hearing held on the tenth trial day, Fotomat was unable to identify any prejudice to that point (XI Tr. 1686, 1704) but was concerned about the effect of the unseen portion of the brief on its defense which had not yet begun (XI Tr. 1687, 1705). On that day, before *any* of Fotomat's witnesses testified[8] and almost two weeks before it began

answers filed eleven months before trial. R. 559, p. 126. Any brief is argumentative and presents the view of its authors. The brief in this case is a matter of record. R. 1552-1779. It deals with the issues in this case and involves vitriol or personal attacks only in the sense that it contends —and four judges have agreed—that Fotomat's conduct was oppressive, not in good faith and in some instances fraudulent. It is no different from any other brief as a review would readily reveal.

[8] The Court of Appeals (in footnote 6 to the opinion) did not pass on Fotomat's suggestion at oral argument (by counsel who did not participate in the trial) that perhaps some of the witnesses who plaintiff Photovest called to testify in the first nine days were actually defense witnesses called as hostile witnesses. The fact is that prior to day ten the only

its defense, Fotomat received the entire brief whose delayed service is the basis of the alleged "important question" in this Court. XI Tr. 1726. Fotomat also was given the right to recall Photovest's witnesses who had testified before service. XI Tr. 1716. During the ensuing 21 days of trial, Fotomat raised no further objection or claim of prejudice. Fotomat admitted during oral argument in the Court of Appeals, after almost two years of scouring the record for error, that it knew of nothing in the brief that was not admitted into evidence at the trial and still could identify no prejudice. No evidentiary ruling was challenged on appeal. Photovest disagrees with many other of the statements and characterizations of the events in the district court contained in the petition but submits that none rises to the dignity of an issue for this Court.[9]

The Court of Appeals concluded that the abstract procedure of exchange after trial is consistent with Rule 5 and the Constitution. However, this case does not present that abstract issue for several reasons. These include the fact that, as the Court of Appeals observed, "the delayed exchange procedure was abandoned early in the trial" (App. 11a), as well as the court's finding that there was

witnesses were officers or employees of Photovest (Whitney, Roberts and Thomas) or persons affiliated with independent processors clearly favorable to Photovest (Brodnik and Hawes). Tr. 335, 447, 518, 580, 970.

[9] For example, on day one the edited brief was not "ordered" to be served in three days as claimed by Fotomat (Pet., p. 5). Three days was a "best guess" as to the time revising would require, given that both attorneys familiar with the case were tied up in trial. Tr. 213-4; R. 2297-8. Fotomat obviously knew it did not have the brief until day nine and made no objection. R. 2298. Although Fotomat describes the delay as two months, a recess of eight weeks occurred between day nine and day ten while the court was occupied with other cases at another division. In that district judges still "ride circuit." Moreover, most of the brief was served on day nine before the recess, as the edited version reveals. R. 1801.

no prejudice to Fotomat in any event (*Id.*). The court nevertheless exercised its supervisory powers prospectively to require service of trial briefs in the Seventh Circuit at the same time they are submitted to the court. It did not elect to deal with the other flaws in Fotomat's position, each of which is an independent ground for affirming the district court.

REASONS FOR DENYING THE WRIT

1. The Facts Do Not Present The Issue Fotomat Seeks To Raise

The Seventh Circuit's conclusion that the rules permit exchange at the conclusion of trial, though correct, was dicta. What the court *held* was (a) the nine-day delay on the unusual facts of this case was not error, and (b) Fotomat in any event had neither claimed nor shown any prejudice from the procedure. When the facts are understood, it becomes clear there was no error at all in the manner in which the district court handled a misunderstanding that produced a belatedly raised challenge to local practice. In any event, this presents no significant question because it turns on the odd facts of this case. Similarly, even if there were some abstract error, it was Fotomat's burden to show prejudice. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). Under both Rule 61 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2111, claimed errors "which do not affect the substantial rights of the parties" are not a basis for appeal.[10] This too is a factual determination involving an

[10] The full text of 28 U.S.C. § 2111 is:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61 is identical for these purposes.

analysis of the highly unusual and apparently unique facts of this case. As such, it presents no issue worthy of this Court's attention,[11] precisely because precedent is of little value in evaluating a claim of prejudice:

> "* * * It needs to be emphasized again that whether a particular error is harmless or prejudicial depends very much upon the circumstances of the particular case."

11 Wright & Miller, *Federal Practice & Procedure* § 2888, p. 300 (1973).

Moreover, there plainly is no prejudice. Rather, the delayed exchange had no effect whatever on anything that took place in the trial. Fotomat has never claimed the brief was in any respect false or predicted evidence that did not materialize.[12] Nor has it pointed to any ruling of any kind during the first nine days that was allegedly improperly influenced. To avoid this fatal problem, Fotomat claims that it inherently cannot know how it was prejudiced without "psychoanalyzing" the district court. Petition, p. 10. Yet the doctrine of "presumed prejudice" that Fotomat seeks to invoke has been abolished in the federal courts since the enactment in 1919 of the predecessor to 28 U.S.C. § 2111. 7 *Moore's Federal Practice* ¶ 61.02 (1979). Indeed, even where documents (*e.g.*, "motions") expressly required to be served under Rule 5(a) are not contemporaneously served, it is well settled that there is no reversible error

[11] *See, e.g., Goins v. United States*, 306 U.S. 622 (1939).

[12] *Cf. Benna v. Reeder Flying Service, Inc.*, 578 F.2d 269, 272 (9th Cir. 1978) (harmless error for jury to view inadmissible evidence where its substance is contained in other admissible evidence); *Oates v. S. J. Groves & Sons Co.*, 248 F.2d 388, 389 (6th Cir. 1957) (harmless error for judge in nonjury case to read unadmitted deposition containing matters otherwise in evidence).

unless some prejudice is shown from the delay.[13] This, of course, reflects fundamental policy to eliminate expensive and docket clogging retrials where substantial justice has been done—as it was here.

Fotomat's claim also fails as a matter of simple logic. If Rule 5(a) of the Federal Rules of Civil Procedure required immediate service of trial briefs, the error would *not* be giving the brief to the court. The alleged error is deferring service on the other side. Otherwise stated, if this case involved any "substantial right" of Fotomat within the meaning of Rule 61 or 28 U.S.C. § 2111, that "right" would be to receive a copy of the brief at the same time it is submitted. Fotomat has no right—substantial or insubstantial—to stop Photovest from saying what it wishes in its brief. Both sides submitted initial trial briefs at the start of trial. Fotomat then submitted two more briefs during trial—an unserved brief on day three and a 290-page brief on day ten. Both sides submitted extensive post-trial briefs. Whatever impact the briefs had *on the court* existed regardless of time of service on the opponent. Fotomat needed—but failed—to show how *it* would have acted differently if it had obtained Photovest's first brief without a nine-day delay. If there were any prejudice, it would necessarily be in the nature of some act or omission by Fotomat during the first nine days of Photovest's case based on lack of knowledge of the brief's contents. In the

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[13] *See, e.g., U.S. Industries, Inc. v. Semco Manufacturing, Inc.,* 562 F.2d 1061, 1066 (8th Cir.), *cert. denied,* 434 U.S. 986 (1977), which rejected an appeal based upon an unserved motion for a directed verdict:

> " • • • Beyond its allegation that an error occurred, Semco makes no allegation that it was prejudiced in any way, or that it would have proceeded differently with its presentation of evidence at trial."

See also, Hahn v. Becker, 551 F.2d 741, 745 (7th Cir. 1977); *Chief Freight Lines Co. v. Local Union No. 886,* 514 F.2d 572, 577 (10th Cir. 1975).

trial court, in the Court of Appeals, and in the three years since this incident first came to the parties' attention, Fotomat has pointed to no such act or omission.

In short, the nine-day delay made absolutely no difference in the conduct or result of the trial. For that reason alone the decision of the Court of Appeals is clearly correct, and involves no issue of general interest. It is no more noteworthy than if the service copy of a brief were lost in the mail for nine days or if the district court had announced on day ten that it had completed reading plaintiff's brief and would turn promptly to defendant's.

Finally, Fotomat suggests that delayed brief exchange presents parallels to *ex parte* communication with the court. That is incorrect. First, the question is only *when*, not *whether* the opposing side receives the brief. Under the delayed exchange procedure the brief of each side in its entirety is served at the conclusion of trial. Either side can then respond as it wishes to anything with which it disagrees. The risk of overblown claims or predictions that are not fulfilled is obvious, and judges are alert to compare the claims of the parties to the evidence. Second, the procedure in the abstract is neutral—both sides avail themselves of it. No one has a right to unilateral *ex parte* meetings with the court. But both sides have a right to file briefs and neither has a right to stop the other. Third, under delayed exchange procedure there is no doubt about what the trial brief said and, therefore, no doubt about the ability to rebut or to show prejudice if there is any. The procedure is thus wholly different from unknown *ex parte* communications that taint the appearance of impartiality even if no improper influence is in fact exercised. Indeed, because the brief is served before decision with an opportunity to reply, it is not *ex parte* at all. Fourth, the

brief does not "kerwhoppy" anyone; and contrary to Fotomat's claim (Petition, p. 4), the district court did not imply or state that that is its purpose. What the district court said, and what is true, is that a brief that is not to be exchanged until after trial often predicts the *evidence* that will "kerwhoppy" witnesses who are expected to testify inaccurately. Tr. 214. Of course, this is done in open court. As it turned out in this case, the brief was served before Fotomat's witnesses testified but the telegraphed punches landed anyway. In short, the procedure is sensible and is permitted by the Federal Rules as they are presently written. It certainly affects no fundamental or substantial right of any party.

2. The Issue Was Waived Because Not Timely Raised.

Among other reasons for rejecting Fotomat's contention not reached by the Court of Appeals, the district court held:

> " * * * The parties were fully informed of the rule long before the commencement of the trial and no reasonable effort was made to timely seek an advance of trial ruling upon the rule and policy of this Court concerning exchange of trial briefs."

R. 2336. Until the eve of trial Fotomat made no objection to the local rule or to the pretrial order entered months before the trial began. Unlike previous versions proposed incident to earlier postponed trial settings, that order did not require exchange of briefs. R. 2289-96. Under long-standing practice, that order, authored by Fotomat and approved by Photovest, normally provides whether briefs are to be exchanged before or after trial. XI Tr. 1724; R. 2295. Only on the last day before trial did Fotomat voice any disagreement with the delayed exchange procedure. That was after Photovest—in reliance on the local

rules, local practice and the pretrial order—had submitted its brief which had been prepared on the assumption it would not be available to Fotomat's witnesses until after they had testified. As the district court held, that was too late to object. After reviewing the extensive exchange of correspondence and finding no order or agreement requiring pretrial service, the district court correctly determined to "leave counsel where they find themselves." XI Tr. 1718.

Fotomat knew of the local practice and rule from the outset of the case. Indeed, at the first pretrial conference, through its local counsel, Fotomat took the position that it preferred *not* to serve trial briefs at the time they were submitted. R. 2291.[14] Its effort to raise an issue on the eve of trial through its internal confusion presents no basis for appellate review.

3. Fotomat Waived The Issue By Submitting Its Own Unserved Brief.

When its chief trial counsel learned that trial briefs could be submitted but served only after trial, Fotomat promptly submitted its own brief dealing specifically with the credibility of Photovest's principal officer. Tr. 215; R. 1794. That witness was cross-examined by Fotomat for five days while Fotomat's brief was submitted but not served. Only after the completion of the testimony discussed in its unserved brief did Fotomat decide that it should serve the brief and claim irregularity because it had not received Photovest's. At that point, Photovest also voluntarily

[14] In this respect the Seventh Circuit's observation that "Fotomat was apparently unaware of the procedure until the first day of trial" (App. 4a) is incorrect. Fotomat's chief trial counsel were unaware of the rule (*see* n. 6, *supra*), but Fotomat's local counsel (and, hence, the party Fotomat) clearly was familiar with the procedure from the outset. X Tr. 1697; XI Tr. 1722.

served its brief. In short, Fotomat availed itself of the practice it now urges as a basis for reversal. These facts constitute a waiver of procedural irregularity. *United States v. Patrick,* 542 F.2d 381, 392 (7th Cir. 1976), *cert. denied,* 430 U.S. 931 (1977). But that issue is of absolutely no general importance or interest to this Court.

4. There Is No Conflict Among The Circuits, And No Significant Issue.

This issue has never arisen before in any federal case[15] and is unlikely to arise again. There is no conflict among the circuits as to any issue. Obviously the exercise of circuit supervisory powers involves no conflict—there simply may be a different practice in different circuits. Variances in local district rules are equally unimportant. Moreover, there is no case or controversy as to the exercise of supervisory powers because neither side has any interest in the rule established for future trials.

There is also no significant issue for the same reason the issue has never been raised before: in the few federal districts permitting delayed exchange of trial briefs, both parties normally agree whether service will be before or

[15] One state case also rejected a similar claim. *Scott County School District 1 v. Asher,* 160 Ind. App. 299, 312 N.E.2d 131, 136 (1974), *aff'd,* 263 Ind. 47, 324 N.E.2d 496 (1975). Independent research by Fotomat, Photovest and the Court of Appeals (App. 6a) has failed to turn up any other federal case. Photovest's efforts in this regard include, on February 1, 1980, running the following Lexis search through the "cases" file of the "general federal" Lexis library: TRIAL BRIEF or TRIAL MEMO! w/25 RULE 5! The search turned up 78 cases, only one of which (the Court of Appeals decision in this case) dealt with an issue of delayed service of a trial brief. Most of the 78 cases dealt with Rule 52 (findings and conclusions) or Rule 56 (summary judgment) which are included by Lexis in a request for "RULE 5!" Lexis' "cases" file presently includes district court opinions (many otherwise unreported) since 1960, court of appeals opinions since 1945, and Supreme Court opinions since 1938.

after trial. The simple fact is that the issue was generated in this case by peculiar facts, notably a misunderstanding which Photovest submits was attributable to Fotomat. The issue cannot recur in the Seventh Circuit by virtue of the rule announced in this case. There is no reason to believe the issue is likely to come up anywhere else just as it never arose before in the Southern District of Indiana, because the pretrial order normally resolves the matter to the satisfaction of both sides before either prepares its brief.

5. If A Change In Rule 5(a) Is Appropriate, Rulemaking Powers Of This Court—Not A Replay Of A Lengthy Trial Involving No Prejudice—Is The Appropriate Procedure.

In 1970, Rule 5(a) was amended to require that all discovery papers are to be served on all parties, adding a requirement that did not previously exist. 48 F.R.D. 491-2. If the federal rule should be changed nationwide to require contemporaneous service of trial briefs, amendment of the rule is also the procedure for that. There is no reason to review this case. Indeed, if the issue may be raised on the eve of or during trial as Fotomat seeks to do, an unknown number of pending trials would be disrupted by such a review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1137

FOTOMAT CORPORATION,

Petitioner,

vs.

PHOTOVEST CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

The Petition for a Writ of Certiorari in this case has raised the issue of whether the practice of permitting the filing of in camera trial briefs undermines the integrity of the fact finding process. Respondent has acknowledged the significance of this issue, even characterizing as "well settled" the fact that trial briefs are frequently not subject to service under the rules and/or practice of many federal courts (Opp. at 4, 14). Respondent has also acknowledged the impact of such briefs, admitting Fotomat's observation (Pet. at 3) that the lengthy brief accepted by the trial court was specifically intended to be withheld from opposing counsel (Opp. at 5).

Respondent's opposition rests on several factual allegations which, seen in proper context, are not correct;

which are essentially irrelevant to the blanket rule proposed for adoption by petitioner; and which, to the extent they are pertinent at all, serve only to highlight the need for such a rule prohibiting ex parte communications to the trier of fact.

1. Respondent has observed, no less than six times (Opp. at 2, 6, 8, 9, 10, 11), that there was but a short delay of nine days between the filing of its in camera brief and its service upon Fotomat counsel. All but ignored is the fact that between the ninth and tenth day of trial there was a two month recess. During this time, Fotomat still did not have the full Photovest trial brief. Only after Fotomat raised the issue before the trial court for the third time and asked for a mistrial and recusal of the trial judge—which motion was denied—did Photovest decide to serve its brief (XI Tr. 1715-1716, 1726).

2. Respondent urges that Fotomat was somehow guilty of calculated delay because no objection was voiced to the secret Photovest trial brief until "the eve of trial" (Opp. at 12-13). Yet the bottom line is that the challenge to the practice was made in good faith immediately upon learning that the ex parte filing had occurred. The Court of Appeals itself concluded that "[n]othing in the record suggests any foul play or attempts to secure an unfair advantage by either party" (App. A at 5a).

Moreover, one wonders just why it "was too late to object" (Opp. at 13) on the day that the ex parte filing occurred. At that time, the trial court could easily have returned the Photovest trial brief unread. By that simple remedy, the taint upon its subsequent findings could have been prevented.

3. Respondent also tries to pillory Fotomat because it "promptly submitted" an in camera "brief" of its own on being denied "immediate access" to Photovest's secret brief (Opp. at 6). That characterization is inaccurate.[1]

4. Finally, respondent urges that there has been no showing of how Fotomat would have acted differently if it had been timely served with the trial brief (Opp. at 10). To the contrary, Fotomat would obviously have responded to Photovest's concealed advocacy. More importantly, had a rule establishing the need for service existed, the response to the full Photovest brief would have been made to a trier of fact who was necessarily cognizant of the need to examine both views of the case before accepting "all the

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[1]Fotomat first complained to the trial court the Friday before trial was to convene, only to be told that the parties would be left "where they find themselves" (App. A at 3a). Fotomat sought reconsideration of this decision on the first day of trial. The trial court then ordered Photovest to serve only an abridged version of its brief (App. A at 3a). Fotomat then asked if the unserved portion might be returned to Photovest by the court so that there would be no ex parte material involved in its decision making. This was refused (II Tr. 214-215).

Only at this point did Fotomat—in response to a ruling which it considered unfair but which was obviously going to constitute the ground rule of that trial—ask to file a paper with the trial court alone (II Tr. 215). This so called "brief" was but a five page paper discussing one of Photovest's witnesses, and was given to Photovest's counsel during the two month recess. Respondent did not then "voluntarily" turn over its complete brief on receipt of Fotomat's five page paper as described in the Opposition (Opp. at 13-14). The full Photovest brief was served only after the recess when Fotomat unsuccessfully moved for a mistrial and recusal of the trial judge, and this belated service was quite possibly in response to the trial court's own expression of doubt as to the propriety of what had occurred (XI Tr. 1725-26).

help I can get that helps me get ready for correct rulings" (II Tr. 215).

In sum, respondent's attempted factual dissection of the record serves only to affirm the necessity of a clearly articulated rule barring unilateral advocacy of any type in any context.[2] In the absence of a dispositive rule to guide courts and litigants, an unsuccessful party whose case has been subject to secret communications with the trier of fact must inevitably question whether a subsequent adverse decision was truly the result of an unbiased resolution of the issues at hand. The successful litigant, on the other hand, can only respond with the equally unprovable claim that no prejudice has accrued.

This kind of debate hardly serves to instill confidence in the integrity of the judicial process. A rule mandating the contemporaneous service of all matters filed with a court[3]—which a fair reading of Rule 5(a) would appear to require anyway—would go far to restore and preserve the trust that courts, like other governmental institutions, so sorely need.

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[2]Such an absolute rule has recently been adopted by the Ninth Circuit in the even less restrictive context of administrative proceedings. *Grolier, Inc. v. FTC*, ... F.2d .... (9th Cir. 1980). In that decision, the Court of Appeals held that an administrative law judge was presumptively barred from presiding over a case if he had received any information on the case, or on a related matter, when working as an advisor to a commissioner, even though the judge no longer recalled that he had ever had any contact with the case in question.

[3]Respondent's intimation (Opp. at 15) that the 1970 amendment to Rule 5(a) manifested an intent to leave ungoverned ex parte documents not specifically mentioned is misplaced. All that that amendment did was to require service, on an otherwise uninvolved party, of papers already required to be served on a party intended to be affected by those papers. See 2 MOORE'S FEDERAL PRACTICE §§ 5.01[8]-[9], 5.02, at 1313-14 (2d ed. 1979). Quite obviously, then, the import of the amendment is to emphasize even more strongly that Rule 5(a) is intended to ensure that *every* party sees *everything* that is filed.

Conclusion.

For the reasons stated above and in the Petition for a Writ of Certiorari, a writ of certiorari should be granted and a new trial ordered.

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